IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

MARIE J. FONTANA,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), R.J. REYNOLDS TOBACCO COMPANY, LORILLARD TOBACCO CO., and BROWN & WILLIAMSON TOBACCO CORP., Individually and as Successor to the AMERICAN TOBACCO COMPANY,

Defendants.

COPY

CASE NO. 00-1731 CA01

TRIAL

Volume 4

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Thomas S. Wilson, Jr., Circuit Judge, at the Dade County Courthouse, 73 W. Flagler Street, Miami, Florida, on Tuesday, March 20, 2001, at 1:45 p.m.

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(THEREUPON, the following proceedings were held:)

THE COURT: I think we can take up this motion in limine while they set up.

MR. HUNTER: Judge, could I be heard preliminarily on this motion in limine?

THE COURT: Certainly.

MR. HUNTER: I've been to Vermont twice now to take the deposition of Dr. Irvin. His deposition and his qualifications and his testimony started a long time ago. And I got this motion in limine, which is approximately -- very thick, delivered to me today.

This is something that I think is unfair. I think it's happened to me already in the short duration we've been here and that is, the morning of an important day of proceedings, I get hand delivered to me a gigantic motion that somebody has been working on obviously for days and days if not hours and hours.

This has all kinds of case law citation. It would be impossible for me to be able to attend to the matters before this Court and to have any kind of -- to have any kind of response, a genuine response to this Court on

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this motion with no time to prepare.

And I would ask the Court to not require argument on this issue, let us proceed to give opening statement to the jury; and when I call Dr. Irvin, since they chose not to bring anything before the Court in an earlier basis, that I be able to put him on the witness stand and try to qualify him to give him the opinions that they know he's going to give, since they've heard his testimony, and the Court entertain objections at that time as the testimony proceeds.

But to try to drop into my lap an extensive motion in limine right before I'm about to give an opening statement is impossible for me to respond to.

THE COURT: Mr. Reilly.

MR. REILLY: Your Honor, the reason we filed this motion now is because this really is the earliest opportunity we've had to make this motion before Your Honor in light of the bifurcation of Dr. Irvin's deposition.

Your Honor will probably recall that Dr. Irvin is the guy who halted his own deposition and said he didn't want to

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participate anymore because he was irritated by the process. Your Honor required that plaintiffs' counsel reproduce him. He did and we've now had an opportunity to complete his deposition. Now is the time for a Frye motion. You can't file a Frye motion until you've completed the deposition of the expert.

There are clearly -- I don't know whether other motions will be filed on the mornings of further proceedings in this case, I can't predict that. But I do know that this is a very important motion. Merely because it involves work doesn't mean that we don't go ahead and do the work.

We now have exactly what Dr. Irvin maintains the basis for his opinions is, and to the extent that it rests on speculation, which he can't do, and to the extent that it is the expression of opinions that doesn't satisfy Frye, are not based on reliable scientific principles and methodology generally accepted in the scientific community, he shouldn't be able to testify to it.

Likewise, such opinions shouldn't be communicated to this jury even in opening

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statement.

THE COURT: Well, there's a couple of thoughts on that. I always found the most dangerous thing to do in front of a jury is to tell them something in opening statements you couldn't prove. Because if the other side is going to pay attention, the other side is going to remind the jury in no uncertain terms what was said in opening statement and what they were able to produce to the jury for their consideration.

That to me is probably the most damning thing that destroys cases faster than anything else. Because if you lose credibility with the jury, you're going to lose outright. And how you behave and how you act and what you say in front of a jury has an impact. And they either believe you or they don't. If they don't believe you as the attorney representing somebody -- representing anybody, you're in potential deep do-do, to put it mildly.

So what I'm going to do is this, since this is the last -- it just came in today and they have not had a chance to read it. I barely got through it over the lunch break and

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obviously didn't have a chance to read all of the attachments but to study the motion.

I'm going to take this up when he gets ready, prior to putting on Dr. Graham.

MR. REILLY: Irvin.

THE COURT: Irvin, I'm sorry.

MR. REILLY: Everybody starts with an "I" or "E" around here except Reilly.

MR. HUNTER: Your Honor, I'd like the Court's guidance on use of exhibits during opening. I know from Broin 1, Mr. Rosenblatt argued very vigorously that the defendants not be permitted to show these numerous exhibits that they had prepared because they took on the appearance of evidence and argument.

I know they've got a whole list of things that they haven't shown me that they intend to use. And I would ask, if they intend to use any sort of a prop during opening statements, that they first show it to us so we can look at it.

And my suggestion is that we proceed to give an opening statement to this jury without such aids.

MR. REILLY: Your Honor, clearly we object

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to not being able to use charts of some kind to summarize what we --

MR. HUNTER: I didn't finish up.

And Judge Kaye denied them the opportunity to --

MR. REILLY: That is utter nonsense, you know how I know? I know because I gave opening statements in Engle.

MR. HUNTER: No, I'm talking about Broin.

MR. REILLY: Well, you commented on Broin and Engle. I appeared before Judge Kaye for a year. I gave two opening statements, I used boards to summarize exactly what the evidence was going to be.

THE COURT: My general rule is that if you don't show it to the other side previously or it hasn't already been marked in evidence, then you don't get to use it. So if you want to show them what you're going to use and they can look at it, see if they have any fair comment.

Who knows what they're going to agree to and not agree to?

MR. REILLY: Maybe we should take five minutes and plaintiffs' counsel should show us what he plans to use.

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For example, I don't know if he plans to put photographs before the jury.

THE COURT: That's one of the reasons that I thought it might be fun to have some of the exhibits already marked that you all knew, all of you, both sides know that you're going to be putting into evidence.

And my court clerk asked for it, I asked for it, and we haven't gotten very far. And partly through my own fault. But it comes down to look at it, we'll take five minutes. You all go over it, see what you have.

(Discussion off the record.)

MR. REILLY: Apparently he's not using any. You're not using anything in your opening statement; you're just going to stand up and talk.

MR. GERSON: Word pictures.

MR. REILLY: Word pictures, perfect.

MR. HUNTER: Let me start with Mr. Reilly, first, if I can.

Judge, could I proceed in my own fashion without Mr. Reilly directing my presentation?

THE COURT: I think that sounds reasonable to put them all up there.

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MR. REILLY: Don't hurt them.

THE COURT: He won't hurt them.

MR. HUNTER: I know this is argued in Broin 1, kept out because this is a type of exhibit which is not even an exhibit, it's a demonstrative aid. They intend to get up here and show a picture of the Sweet & Low tablet and point to the Orange Bowl and say that a microgram is this type of unit compared to that type of a unit.

This is picture charts which all take into the nature of -- all seem to be in the nature of evidence that's not been admitted yet or argument.

And this shows pictures of cigarettes and very -- I don't know that that's going to be established in the evidence in this case, that that's the way smoke comes out of a mouth. In fact, I'm going to deny that it comes out that way.

And this chart -- now I'm showing a chart. The first chart was called what, Phil? The one with the Sweet & Lows, for the record?

Well, this chart is called: What is environmental tobacco smoke? Which I dispute

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that smoke comes out of a smoker's mouth like that also.

This chart is probably fairly benign, but the point is, let me show what Mr. Engram has in mind.

MR. REILLY: Wait, finish with mine.

THE COURT: Let's stay with just Mr. Reilly's right now.

MR. HUNTER: This chart, or this big picture that I'm showing you, I can't tell what it is, but it looks to be a computer animation of the inside of an airplane.

THE COURT: Hold on a second, please.

(Discussion off the record.)

THE COURT: Okay, I'm sorry.

MR. HUNTER: I object to this -- I object to every chart. I object to using these charts in opening statement. They've never been disclosed to me, they've never been listed, they didn't list these on their exhibit list.

These are all demonstrative aids. I've even alerted the position to the Court. This demonstrative aid seems to be almost a photograph of an interior of an aircraft with a bunch of lines, which I'm not prepared to -- I

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don't know what that is and I haven't agreed to it and I dispute it.

This is domestic versus international flights, and it has 1993, 1994, 1995, 1996 bar charts. I deny that this is accurate. I've never seen it before, it's never been shown to me, I don't know if it's accurate, but there's no evidence that's been presented by proffer or anything else to show this is accurate. I don't think it should be used in opening until a foundation has been laid for it.

The next chart shows agents that flight attendants are exposed to that can affect their health.

First of all, if they're going to make an argument on causative, you have to put on a witness that says that this agent did, within a reasonable degree of probability, affect Mrs. Fontana's health. But also again there's no evidence before this jury that I can tell the Court with any -- I don't know how they're going to prove that these things can affect their health; and if they can't prove that they did affect the health of Marie Fontana, I object to it, because in order to show

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alternative causation, they have to show us more likely than not that one of the agents they contend was an alternate cause did have an affect on the plaintiff.

That all has to be the subject of testimony that will come in that I can dispute and try to prevent. But when the bell rings, it's not anything --

THE COURT: Okay, I've got your position.

MR. REILLY: Your Honor, none of these blow-ups, none of these depictions are anything more than the words I am going to say to this jury. All they are -- I could paint a visual image or I can make a verbal image. This is not evidence, and I'm not representing that it's evidence.

And I'm delighted that Your Honor tell them that nothing that is said or nothing that's shown on a board is evidence in this case.

As a matter of fact, Your Honor, you probably always say that anyway. But I've never been in a trial where you couldn't employ a visual aid to go along with the words you use to describe what the evidence is going to be in

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the case.

Now, Mr. Hunter can spend all day long telling this jury that this isn't how a smoker exhales or how the smoke comes out, I don't care. But all it is is a demonstrative to say to the jury: Look, there's a difference between mainstream smoke, sidestream smoke and environmental tobacco smoke.

And all I'm going to tell them is: Look, clearly this isn't a person, but it's a depiction of a cigarette and how a person takes a puff on a cigarette, that's all.

I've never been in a trial where I was not permitted to just simply make a representation, just a verbal image, along with a demonstrative, that helps the jury understand what the evidence is going to be.

Is it evidence? Clearly not. Am I obligated to put it on an exhibit list? Clearly not. You don't list things that are not exhibits on an exhibit list.

Matter of fact, I think it's a little ironic that Mr. Hunter's boards are now in the back of the room because he's decided to play this game.

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MR. HUNTER: They're right there.

MR. REILLY: But your staff told me that I couldn't look at them because you weren't going to use them now.

Now, the fact of the matter is that demonstrative aids are used in every opening statement.

Now, Mr. Hunter said: I dispute that. Then he said: I don't know if it's accurate or not.

So I don't know how he disputes it, but the fact of the matter is that Your Honor referred a moment ago, if you say it to the jury and you don't end up proving it, you've hung yourself out. And I agree with that.

We didn't argue this motion on Dr. Irvin and you let plaintiffs' counsel say -- you're going to let him say whatever he wants to say about Dr. Irvin and Dr. Irvin's opinion.

This isn't even an opinion of an expert who is going to come testify. These are documents that we've stipulated to in this case, that I've simply gathered together, looked at and decided that these are the appropriate numbers.

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If they turn out not to be, Mr. Hunter will take this board in closing argument and he'll say: Remember when Mr. Reilly put this board up in front of you and he told you that this is what the evidence is going to be? Well, it wasn't. She didn't fly 186 times -- matter of fact, this number comes from his stuff. He'll say, you know what? She didn't fly 186 flights in 1995 and 149 of them weren't domestic flights. But that's always what happens.

You know what? I've never even seen a guy make an argument like this. What is this? It's just a depiction of the inside of an airplane.

Am I going to tell these people this is the airplane Ms. Fontana flew on? Heck no. What's the point of this? The point of this is to give these folks a visual image of how the air flow pattern is on airplanes with a ventilation system. That's all. It's just an aid to help them understand what I'm talking about.

We're taking people right off the street, we're bringing them into a lawsuit that

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involves a subject matter they've never even dreamed of. And all I'm providing them with is a visual aid to understand the words that I'm talking about. But if you say to these people: Look, you're going to see a bunch of demonstratives here that they're not evidence in this case, perfect, tell them that, they're not evidence in this case.

I'm in 100 percent agreement with that. But that doesn't mean I can't use them to help tell the tale of what the evidence is going to be in this case. That's all opening statement is, it is not evidence. This is not evidence and Judge Kaye has never permit -- Stanley Rosenblatt or anybody else to not allow the use of these kind of visual aids in the course of an opening statement.

Granted, I wasn't there for Broin, but I was there for a year of Engle and I gave two opening statements, and I used these very same kinds of visual aids in both those opening statements, both of them.

There is nothing wrong with these things, and Mr. Hunter can't show you a case that says what he's talking about. I guarantee you that.

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MR. HUNTER: Judge, just on Dr. Irvin, I'm not offering anything other than traditional opening statement of what I expect the evidence to be. But these types of charts, and I'm now showing Mr. Engram's charts, these go beyond a description of the jury. These are argumentative. He's going to show this jury, and they're going to have note pads, that the definition of chronic bronchitis, and he has the presence of chronic productive cough for three months in each of two successive years.

That is a definition subscribed to by some of the witnesses in this case, but it is going to be one that I don't accept. He can tell the jury that they're going to hear a medical definition of chronic bronchitis, and he can tell the jury what it is. But to get up there and put a chart there in front of them is argumentative, it's not evidence yet, and it takes on, no matter how you try to instruct the jury, it takes on the appearance of evidence to them that they are not going to be able to erase.

I know for a fact that Judge Kaye in Broin 1 did not allow the defense to use any of

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these demonstrative aids. I know for a fact. I read the transcript.

Now, an opening statement is a statement that the attorneys make to the jury. It has always been oral, traditionally been oral, with sometimes a stipulated piece of evidence that the parties stipulate to beforehand, which the defendants have not attempted to do with me. They have never shown me these exhibits or these demonstrative aids, they've never listed them.

And I submit to the Court that the traditional manner in which the attorneys give an opening statement is they tell the jury what they expect the evidence to be, and they call the witnesses and introduce evidence. And if the witness satisfies the predicate that he needs a chart in order to explain or assist him in explaining his testimony because of its particular nature to the jury, then and only then is he able to use a demonstrative aid.

Now, I don't know if they'll ever establish that predicate, because we're here before the trial has even started. But to allow counsel to have about 20 to 25 exhibits

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which are argumentative, appear to be in the nature of evidence, is so prejudicial to the plaintiffs that I cannot recover from. And I ask that the Court restrict opening statements to the traditional manner in which we give opening statements, that is, to limit the attorneys to oral presentation.

MR. ENGRAM: Your Honor, may I respond with respect to my exhibits?

MR. HUNTER: These might be appropriate in closing and I agree. It might be appropriate to refer back.

MR. ENGRAM: Your Honor, this case does involve complex medical issues, it involves at least five different disease processes. What I have done is I have used the plaintiffs' own witness, Dr. Charles Irvin, who said that he sat on these committees of the American Thoracic Society in developing or reviewing statements on sarcoidosis, chronic obstructive pulmonary disease and standardization for spirometry.

What we have here, taken verbatim from the American Thoracic Society statement on chronic obstructive pulmonary disease, is the ATS

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definition of chronic bronchitis.

So to say that he wasn't on notice, these exhibits were used during Dr. Irvin's deposition, he made a great big deal about the fact that he had viewed them and approved them and had been on the committees of two of the four. There's no element of surprise here, Your Honor.

Then the other outtakes that I have are from plaintiffs' own exhibits, one of these books that's this thick, I have pulled out a couple of pages or a couple of references from three pages. I have three pages of medical records that the plaintiff has taken out of this notebook.

I can highlight what I think the evidence is going to be in this case, Your Honor. We've stipulated, or Your Honor has ruled with respect to some of this information, that it's going to be admissible, and we've stipulated it's the authenticity of the medical records.

Then the other exhibits, the exhibits attached to depositions, are identified on exhibit lists as potential exhibits in this case.

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There is no surprise here, Your Honor. This is the year 2001. And when we do opening statements, we do it in a way that can convey our thoughts that's most receptive to a jury, and people understand things more than just by hearing them.

THE COURT: All right, everybody has been playing this game about not disclosing what they in fact are going to do and, in fact, what they're going to say. And we haven't been able to get the exhibits which everybody knows should have been marked and could have been marked, with a few exceptions where there would be problems over them.

So my general rule, and has been in the past and probably will remain until somebody tells me I'm doing something wrong, and that is, unless the parties agree to demonstrative aids being used, I'm not going to allow them.

So we're going to have to go back to the traditional way of talking to jurors, and I have no problem in thinking that the jurors can understand a well spoken word. So they are --

MR. REILLY: Your Honor, can we draw?

THE COURT: You can draw anything you want

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to draw.

MR. REILLY: Can we have an easel and draw on it?

THE COURT: You can write what you want to write. But I'm going to keep these formal exhibits out until they're going to be introduced as demonstrative aid during the testimony of a witness.

MR. REILLY: For example, Your Honor, I wouldn't use -- all this is --

Let me show you something. Take a look at this, your Honor. I'm never going to use that with a witness, because it isn't what a witness is going to address. This is what I'm going to tell the jury are the subjects that I'm going to address in my opening statement.

All it is is a little summary so that they can be aided in following along with my opening statement.

Now, what I'm going to tell them is, the issue that I'm going to address is how much environmental tobacco smoke was Ms. Fontana exposed to.

And there are three categories in which this evidence is going to come in in this case,

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that we're going to present in this case. All this does is help the jury follow my statement. It doesn't provide them with any evidence. It doesn't provide them -- as a matter of fact, you said that we've been playing a game about not disclosing things on exhibit lists.

These things would never appear on an exhibit list ever, because they are not exhibits. All they are is demonstrative aids that help the jury follow along with what you say the evidence is going to be.

Now, what's happening here -- let me tell you something, I said I wasn't in Broin and I wasn't. But I was present for the first -- for the opening statement in Engle, the very first opening statement in Engle by both sides.

Mr. Rosenblatt used visual aids, and for example, Mr. Heim, who was representing my client in this case, used a time line. Mr. Rosenblatt didn't object to it, and I have a time line here.

MR. REILLY: This lady's history spans 20-some years, 25 years of flying on airplanes. There is no way that this jury can possibly follow in 45 minutes listening at the end of

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the day. I'm the guy who is going to get disadvantaged here, because I have the last opening statement today. And I'm going to have to explain to this jury the flying history of Ms. Fontana to explain this part of my opening statement.

How often was she in the environment? Sure, I can just say to the jury: You know what? Ms. Fontana flew for 26 years, or 24 years, from 1972 to 1996. And I can just say to them the events that occurred during the course of that time frame.

Will they get it? Will they walk out of this courtroom with one date in their heads? Not one.

Why are we doing that to them?

THE COURT: That's a pretty low opinion of jurors.

MR. REILLY: It's a fact of life. There are studies all over this country and all over the world that talk about how people retain information. And they retain it far better if they both hear it and see it. And what Mr. Hunter wants to do -- and Mr. Heim put up a time line just like this to talk about the

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major events that occurred in the history of tobacco.

Now, this is not a time line about the history of tobacco, this is a time line about certain events that I'm going to talk about, that are directly related to Ms. Fontana's life as a flight attendant.

Now, can I say them all? Sure. Can I write them all? Could I draw a time line on this pad? Sure, I could. But I can't do it in 45 minutes.

All this does -- you've given me, as a matter of fact, you've given me 30 minutes because that's all I've got. This helps me tell this story in 30 minutes, not in an hour and a half, if I had to draw it and write on it and do all that stuff.

THE COURT: Okay, briefly, Mr. Hunter.

MR. HUNTER: Judge, you've ruled. You couldn't be more clear; and as soon as you did rule, he got up and made his same argument again all from ab initio. He even showed you a new chart which I haven't seen.

These all may be appropriate in summation. But I'd also like to bring to the attention to

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the Court these are the same defendants that argued to you that we should have a 48 hour rule, that I have to show them 48 hours ahead of time.

They had this entire arsenal of charts and demonstrative aids and never once even inferred they had this. Never listed, never given to me. And I don't want to reargue this because you've ruled very clearly that we're going to proceed under traditional manner.

THE COURT: Do me one favor. Look and see if there's any mistakes in the time line.

MR. HUNTER: I don't know that the CAB ordered commercial airlines to separate smokers and nonsmokers in 5/73. I know she was working prior to that. I don't know that the TWA flight attendant's strike is necessarily correct, I don't know that that's relevant, whether she attended the Gold Coast School for Real Estate.

I don't know how they're going to work that into their argument, but maybe they are. She works at Andy's Realty for three months. I don't know that. She returns, smoking banned.

I'm not sure there's anything inaccurate

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on there and I wouldn't represent to you that it is.

THE COURT: This is what I'm going to do, all of the demonstrative aids except the time line are out.

And Todd, can we bring the jury in?

We have an hour and a half per side.

(The jurors entered the courtroom.)

THE COURT: Good afternoon, ladies and gentlemen. Hope you all had a good lunch and you're ready to start work.

What I'm going to do now is to read to you the preliminary statement. It reads as follows:

Members of the jury, please accept the following as the Court's preliminary instruction.

This is a civil case involving a disputed or claims between the parties. The parties are the plaintiff, Marie Fontana, and the four defendants, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Lorillard Tobacco Company and Brown & Williamson Tobacco Corporation.

Plaintiff is a former flight attendant.

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She is a lifelong nonsmoker. Defendants are manufacturers of cigarettes.

Plaintiff has sued the Defendants for injuries she claims were either caused by her exposure to secondhand smoke, or environmental tobacco smoke, ETS, or which constituted an aggravation or exacerbation of an existing condition in the aircraft cabins while she was a flight attendant for Trans World Airlines.

It has not been raised as a defense in this case that the plaintiff, Marie Fontana the plaintiff in this case, has in any way contributed to her own injuries, and you are instructed not to consider any such argument in reaching your verdict.

I further instruct that it has not been raised as a defense in this case that the airline or any other entity is at fault and/or contributed to Marie Fontana's injuries, and I instruct you not to consider any such argument in reaching your verdict.

In fact, the question of fault is not for your consideration in this case. You are to determine only whether the plaintiff Marie Fontana's exposure to secondhand smoke,

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environmental tobacco smoke, ETS legally resulted in damages sustained by her.

On this issue, I instruct you that there is a rebuttable --

Let me start over.

On this issue, I instruct you that there is a rebuttable presumption that exposure to secondhand smoke, or environmental tobacco smoke, is harmful to one's health and can cause chronic bronchitis, emphysema, chronic sinusitis and chronic obstructive pulmonary disease in healthy nonsmokers.

Notwithstanding the above, it is the plaintiffs' burden to prove that, 1, she has one of the diseases enumerated above or an aggravation of an existing condition and, 2, that her eposure to secondhand smoke was the specific cause of the disease or agravation claimed by her.

Some of the evidence to be introduced in this trial will be the testimony by live witnesses. Some of the evidence will be in the form of documents, such as medical records. In addition, some of the evidence will be testimony which has been videotaped from a

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previous trial conducted several years ago. In that trial, issues regarding environmental tobacco smoke were involved.

You are to consider and weigh the testimony of the witnesses presented by videotape as though each witness had testified here in person. However, you should not speculate about or consider any other subject or issue regarding the previous trial depicted in the videotapes.

Your verdict in this case must be based on the evidence received during this trial and the law on which I will instruct you at the end of this case.

Before proceeding further, it will be helpful for you to understand how a trial is conducted. In a few moments, the attorneys for the parties will have an opportunity to make opening statements in which they may explain to you the issues in the case and summarize the facts that they expect the evidence will show.

Following the opening statements the witnesses will be called to testify under oath. They will be examined and cross examined by the attorneys. Documents and other exhibits also

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may be received in in evidence.

After all the evidence, the attorneys will again have the opportunities to address you and make their final arguments to you. The statements that the attorneys now make and the arguments that they later make are not to be considered by you to be considered by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and argument also are intended to help you properly understand the issues, the evidence and the applicable law, so you could should give them your close attention.

Following the argument by the attorneys, I will instruct you on the law.

You should give careful attention to the testimony and the other evidence as it is received and presented for your consideration but, you should not form or express any opinion about the case until have you received all the evidence, the arguments of the attorneys and the instructions on the law from me. In other words, you should not form or express any opinion about the case until you are retired to the jury room to consider your verdict after

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having heard all of these matters.

This case must be tried or heard by you only on the evidence presented during the trial in your presence and in the presence of the attorneys and myself. You must not conduct any investigation of your own. Accordingly, you must not visit any of the places described in the evidence or the scene of the occurrence that is the subject of the trial unless I direct to you view the scene.

Also you must avoid reading newspaper headlines and articles in reference to this case and trial. You must also avoid seeing or hearing television and radio comments or accounts of this trial while it is in progress.

If you haven't seen before, there is a T.V. camera in the room. And I already mentioned about reading the newspaper and I want you to abide by it religiously.

The attorneys are trained in the rules of evidence and trial procedure, it is their duty to make all objections they feel are proper. When a lawyer makes an objection, I will either overrule or sustain the objection. If I overrule an objection to a question, the

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witnesses will answer the question. When I sustain or uphold an objection, the witness cannot answer the question. If I sustain an objection, you must not speculate on what might have happened or what the witness might have said, had I permitted the witness to answer. You should not draw any inferences from the question itself. You need both a question and answer for your consideration.

During the trial it may be necessary for me to confer with the attorneys out of your hearing, talking about matters of law and other matters that require consideration by me alone. It is impossible for me to predict when such a conference may be required or how long it may last. When such conferences do occur, they will be conducted as to consume as little of your time as necessary for a fair and orderly trial of the case.

During the trial we will take recesses. During these recesses you should not discuss the case among yourselves or with anyone else, nor permit anyone to say anything to you or in your presence about the case.

Further, you must not talk with the

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attorneys, the witnesses or any of the parties, about anything until your deliberations are finishe. In this way any appearance of something improper can be avoided.

If during a recess you see one of the attorneys and he or she does not speak to you or even seem to pay attention to you, please understand that the attorney is not being discourteous but is only avoiding the appearance of any improper contact with you.

If anyone tries to say something to you or in you or in your presence about this case, tell that person that you are on the jury trying this case and ask that person to stop.

If he or she keeps on, leave at once and immediately report this matter to my bailiff or my court deputy, who will immediately advise me.

Frankly, I've heard of it happening, but I've never seen it happening in 25 or 30 years of trying cases or being a judge. But keep it in the back of your mind.

At this time the attorneys for the parties will have an opportunity to make their opening

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statements, in which they may explain to you the issues in the case and give you a summary that they expect the evidence will show.

Since the plaintiff has the burden of proof, they get to go first. And both sides have been given the same amount of time, approximately an hour and a half to present their opening statements for you.

With that, Mr. Hunter.

MR. HUNTER: May it please the Court, counsel, members of the jury.

Good afternoon. As I'm sure you all can imagine, this is a very, very important case to all of us. But no one more than Marie Fontana. I will be giving a presentation to you this afternoon and then when I'm done, Mr. Gerson, my co-counsel, will also give you a presentation.

And what we will attempt to do is to present to you what we believe the evidence will show on Marie Fontana's exposure to environmental tobacco smoke, secondhand smoke, her 20 years plus of involuntary smoking that she endured as a flight attendant for TWA.

Marie came to the United States as a young

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child. She was originally born in Haiti. She came here when she was very young. Her mother died shortly after she came here and she was raised by her father.

In 1972, she took a position with TWA.

Marie, you will meet her, and I will try to bring her in this week, you may meet her early in the next week, but what I think you will find from her is that she is an extraordinary person. She speaks five languages. She was a very productive member of society. She's well liked by her friends. She has friends that will come in here that have known her for 20 years and 30 years and will testify as to what she has -- is going through now, and what she will be going through in the future.

In connection with this, I'd like to make the following points that I think the evidence will show. Cigarette smoke is a poison. It contains 4,000 ingredients, about 4,000 chemicals, it may contain more. It contains such things as arsenic, hydrogen cyanide, nicotine, ammonia. It has carcinogenic elements in it that cause cancer in humans and

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animals. And it has been demonstrated and it has been shown that direct smoking causes disease and death and environmental tobacco smoke causes -- and as the Judge has instructed you to presume, and I'm repeating from the Judge's instruction, this is deathly important: I instruct you that there is a rebuttable presumption that exposure to secondhand smoke or environmental tobacco smoke is harmful to one's health and can cause chronic bronchitis, emphysema, chronic sinusitis and chronic obstructive pulmonary disease in healthy nonsmokers.

Now, one of the most important pieces of evidence that I will bring to you in this case will concern the anatomy of the human body.

Follow me on this. Starting at our nose, our nasal passages are filled with hairs, which are designed to keep particles from going in our nose.

Now, as you go through the nose and through the hairs in your nose which are designed to keep particulate matter out, the nose then turns into different channels. It's not just two round holes that go up and then

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down the throat and into your lungs. They come to have channels, which are sort of like the baffles in the exhaust system of a car so that the air now gets channelled, instead of just down one path, it starts to get channelled through different paths.

And the reason is is that each one of these paths is lined by what's called the mucus blanket. The mucus blanket is a sticky substance like a fly trap. And the purpose of that fly trap is so that if particles get through the nose and get into the nasal passages and into the sinuses and drawn down towards the bronchus, these baffles are now lined with the fly trap and the particles get stuck.

Now, if a particle goes past the fly trap and gets into the actual respiratory tract and starts to go down into your precious lungs, then each one of those tubes, every single tube that takes air into your lungs, is lined with little hairlike creatures, I mean little hairlike structures. And they beat in uniform like little soldiers passing a ball up and out again, so that if you get a particle that goes

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into your lung, then these little structures called cilia are trying to send everything back out.

And the cilia are the last line of defense to keep things like environmental tobacco smoke, secondhand smoke, poison from getting into the deep part of your lungs. And after 20 years of heavy exposure to this, and I'm talking transAtlantic flights, ten hours, seven-hour flights on a 747 -- at one point in time there were 240 smoking seats. So you have an airplane, which is essentially a hollow aluminum tube with hundreds of people smoking, and Marie Fontana working in that environment to do her job as a flight attendant. When she started, she started so long ago that the actual term in the manual of TWA people called them stewardesses. And it's a term that, it's been so long since anybody used "stewardesses," it's now, the socially appropriate term is "flight attendant." That's how long she was in this environment.

And she will testify, and other people will testify, that when she would get on the plane, she would begin to cough, she would have

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all of the symptoms that everyone has when they're exposed to high doses of involuntary smoke, secondhand smoke. And she would cough throughout the trip. She would cough when she got home and it would be repeated and it would be repeated, and it would be an occupational exposure that she had for over 20 years.

And it's cumulative. And every time she would get on that plane, the particulate matter would go down her nose and past the hairs and past the fly trap and past the lung tubes, the airways of the lung.

One of the pieces of evidence you'll hear in this case, which I truly find to be fascinating, is as the airways go out --

Let me see if I can draw this.

Can everybody see this if I draw here? I'm not an artist and I'm not an anatomical drawing expert. But I'll give you an overview of what the evidence will be.

You have two lungs and down comes the main bronchus and it arches out into each lung. And then each one of these tubes goes into other tubes, just truly like the branches of a tree.

And you will see Dr. Foley, one of my

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first witnesses -- I hope to bring him for you tomorrow morning -- will show you a true anatomical drawing. And this is called a bronchial tree, because truly it's like the branches of a tree. And as the branches get farther away from the main stem, they get littler just like a tree. Truly, if you draw this upside down, you could put leaves on it, it would look like a tree.

And as the tubes get smaller and smaller, as they reach the periphery of the lung, they terminate into microscopic, very, very tiny things, which allow for the exchange of oxygen. Oxygen goes through the -- they become the -- the walls get so thin that it's really like literally the width of a cell.

So oxygen now transfers through, from the air through the cell wall, into the blood and then back out, becomes carbon dioxide. That's called the gas exchange.

But if you were to take the surface of these airways -- and that's an important term -- if you were to take the surface of those airways and lay each one out in the entire lung of a normal person, it would be the

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size of a tennis court. And that's how much surface area you have to facilitate the exchange of oxygen coming into the lung and then CO2, which is the byproduct coming out.

Now, in about the middle part of her career, Marie, they think, started to develop a condition called sarcoidosis. Now, sarcoidosis is not a disease of these airways. See, smoke, tobacco smoke, causes disease of these airways, because it's a constant irritation. It's an inflammation, constantly.

Now, some people, for reasons that science doesn't know, can smoke three packs a day for 25 years and never develop emphysema or cancer. And the medical community doesn't know why some people can smoke and never get anything and yet other people who smoke the same die of cancer at 35 or 40 years of age. And nobody understands why some people are so -- it's so harmful to them to be exposed to environmental tobacco smoke.

But remember again, in this case, as the Judge has instructed you, in fact, the question of fault is not for your consideration in this case. I'm not faulting the tobacco companies

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as I stand here before you. I'm just saying the issue is: Was Marie Fontana, an individual special human being, was her exposure for 20 years on these long transAtlantic flights did it cause her an injury, and if so, what are her damages?

And I submit to you that the evidence will be that it did, it damaged her airways. It started, as I said, in the nose, she's had sinus problems, she had sinus problems so long, constantly had a post-nasal drip, constantly had clearing her nose, headaches above the eyes. You know how everybody has had sinus before. She had that chronically until one point in time, we think it was in 1990, although these records we've never been able to get our hands on -- we've got medical records of Marie that go back a long way -- she finally had her sinuses operated on because of a chronic condition in her sinuses.

MR. REILLY: Objection, Your Honor, may we approach?

THE COURT: Briefly.

(The following proceedings were had at sidebar:)

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MR. REILLY: This is what this motion for summary judgment was for. Mr. Hunter just made reference to medical records we don't have, can't have, none of us have. He's just made reference to documents that will never be in evidence in this case. I object to that.

He's given this jury the impression that the medical records exist, that we don't have to say what he just said. That is false, we've never seen any such records.

His client testified in her deposition that she had such surgery, but there has never been one doctor come forward to say it. There has never been a doctor who diagnosed her with such condition or said that he operated on such a condition.

So Mr. Hunter has just represented to this jury facts that will never be in evidence in this case.

THE COURT: I take it that she is going to testify that she had this operation?

MR. REILLY: She's going to say she had surgery, but she can't tell you what the nature of her surgery was because that would be a medical opinion.

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THE COURT: If I bust a leg or something like that and I have it set by somebody, I can't tell somebody I had a broken bone?

MR. REILLY: Your Honor, what she said in her deposition was that she had surgery on her nose to correct a deviated septum, not because she had sinusitis. She can't tell us she had sinusitis because that's a medical opinion that lay people aren't allowed to give.

THE COURT: I'm not sure I buy that all together.

MR. REILLY: In addition to that Mr. Hunter just indicated that there are medical records, implying that there are medical records that exist that would tell this tale, but in fact there are none, can't be any, never been produced, no such hospital has ever been located. There is no evidence in this case and there won't be.

MR. HUNTER: We know where she had the surgery. She had the surgery at the Cleveland Clinic, and they told us that their retention policy is after 10 years, and nobody served a subpoena on them.

MR. ENGRAM: The Cleveland Clinic has

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never been identified as the place where she had surgery.

THE COURT: Let's go on. The objection is noted, and let's go on with the openings statements.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

(The record was read by the reporter.)

MR. HUNTER: She finally had her sinuses operated on. You'll hear testimony from one of her next-door neighbors, who looks after her, concerning her attempts to go in for an operation that would help her with her sinus condition, and a friend.

But the records were destroyed and I couldn't, I can't bring you a medical --

MR. REILLY: Same objection, Your Honor.

THE COURT: Same ruling.

MR. HUNTER: I can't bring you the medical records because by the time we went to get the records, under their retention policy, they had been destroyed.

Now, there's a difference between airway

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disease and sarcoidosis.

Sarcoidosis affects not the airways, but the areas essentially around the airways. So if my tree was, as I've indicated in yellow, the sarcoidosis is -- it's an inflammatory disease which causes like a calcification of some of the tissue.

And it hurts the lungs' ability to draw in air, it hurts the actual ability of the lung capacity, the volumes of air.

And when you hurt -- when you have sarcoidosis -- and I'm not contending in this case that that condition was caused by the defendants' tobacco smoke, because no one knows what causes it, sarcoidosis. It usually is a condition which resolves by itself. And it's usually not life-threatening.

It's a disease which they truly don't know what causes it. It is more commonly found in women, African-American women, who seem to have a higher incidence. No one knows why. But that's just one of the things they're studying.

So I'm not contending, and I don't intend to offer any evidence, I'm not asking you to indicate in your verdict that the cause of this

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is something that we'll know at the end of this case. But, if you sicken these airways and inflame the airways and the bronchi, you'd have peribronchial thickening, then one of the airways diseases that you begin to have is bronchitis.

And Dr. Foley, the radiologist, the first radiologist, will tell you about what he sees as, and show you in this lung -- and I don't have his X-ray here with me, but I would show when he gets up here, he'll show you the x-ray. And he'll show you what he calls peribronchial thickening, which is an indication, you can see it on an X-ray, it's something that you can look at, it's an objective piece of evidence to indicate that bronchitis that she has.

She also has emphysema, which is apparent on a CT scan of the chest which was done in 1996.

Now, you're going to hear a pretty interesting story about this CT scan. And you're going to hear from some pretty interesting witnesses. One of the witnesses that -- the Surgeon General first handed out the definitive report on involuntary smoking in

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1986. And since 1986 until now, both the medical community, all of the doctors that study these things to try to protect people from being exposed to something that before we didn't know was bad, but as we gain medical knowledge, we know can harm us, no matter how innocent a bystander we are.

So the expert that I went to, I looked around the country to find out who knows about sarcoidosis. And it's an institution in Denver, Colorado, known as the National Jewish Center for Immunology. At the National Jewish Center in Denver, Colorado are probably the finest experts in the United States on the issue of sarcoidosis.

One of the gentleman who was at the National Jewish Center in Denver relocated to the University of Vermont. He was a pulmonary physiologist. He's a Ph.D. who studies the physiology of the lung, meaning, what is the biological structure of our lung, what are the airways, what is the inside, what is the inside of the airway made out of, how does it communicate to the parenchyma of the lung, how does the gas transfer take place?

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And he was an individual who you will see here by the name of Charles Irvin.

Charles Irvin is probably, has probably written books, chapters in books. He's written 150 medical articles, in periodicals that are reviewed. He's one of the finest experts in the country on the issue of the physiology of the lung.

So I sent the CT scan and the medical records to Dr. Irvin up at the University of Vermont, where he's now located, as a director of the pulmonary clinic. Although he's a Ph.D., he's also a professor of medicine and teaches doctors, he lectures to doctors and travels around the United States lecturing.

And fortuitously, at the time when Dr. Irvin was looking at the records, he put the CT scan up on a shadow box, and strolling through his office was a pulmonologist from Denver by the name of Thomas Petty. And Thomas Petty, everyone will acknowledge is --

MR. REILLY: Objection, Your Honor.

THE COURT: Overruled.

MR. HUNTER: Thomas Petty, the evidence will show you, is a giant in his field, in

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pulmonology. And Dr. Irvin said: Dr. Petty, look at this CT scan blind. I'm not going to tell you anything about it, just look at it blind.

When a radiologist says: Look at it blind, meaning they don't have any background behind it.

And he said: What do you see? And Dr. Petty said: I see end stage sarcoidosis, which means the sarcoidosis is to the extent where it is in its end stage and may take her life.

But I see another disease process going on here. I see airways disease, I see what's called blebs, b-l-e-b-s, which are little holes in the lining. And I think there's emphysema superimposed on that sarcoidosis.

And as a result of that, the combination, the aggravation of this by the environmental tobacco smoke, something that Mr. Gerson will get to a little closer, or in a little more detail, it's the aggravation, and it's the combination of these diseases, the airways disease, the bronchitis and the emphysema that is the reason that Marie right now is on a waiting list for a lung transplant at Jackson

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Memorial Hospital.

Now, one of the points that I'm going to suggest to you that the evidence will show in this case is that environmental tobacco smoke, as it's called by the tobacco industry, or what I call involuntary smoking, secondhand smoke, in order to be regarded as a legal cause of damages to someone in Florida, need not be the only cause. And in this case the evidence will show, as the law says under Florida law, and Judge Wilson will tell you, it need not be the only cause, it may be a legal cause if it acts in combination with another cause.

MR. REILLY: Objection, Your Honor.

THE COURT: Overruled.

MR. HUNTER: The evidence in this case will be that the sarcoidosis, which we don't know the cause for, was one process, was one thing Marie had to fight with; but with that weakened lung in combination with the 20 years exposure to the secondhand smoke brings her to the point in time where she is, or the condition that she's in today.

I'm going to say without any embarrassment that I am going to be proud to present to you

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as a witness in this case the Surgeon General of the United States of America. You will see him testify in this case before you on a television screen. I ask you to listen carefully to his testimony.

I will also bring to you -- and listen to the tobacco lawyers cross examine him, because you're going to be asked to make your ruling on the greater weight of the evidence in this case. And I will bring you, in addition to the Surgeon General of the United States of America, David Burns, who either wrote or was the scientific editor of every Surgeon General's Report, or the chapter on involuntary smoking.

And the tobacco lawyers will cross examine him, but listen carefully to his testimony, because both Dr. Julius Richmond, who was about 80 years old when he testified live in another courtroom before another jury, and Dr. Burns will tell you that exposure to secondhand smoke in airline cabins causes respiratory illness in flight attendants. And that as of 1997 when he testified and even more so today, there is no longer any medical controversy on this issue.

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Yet you will see the tobacco industry will dispute that vigorously and cross examine him.

And listen carefully to both the direct and the cross examination on that point. And be guided at all times by your common sense in this case, because there are medical issues that are going to be presented to you, but there are also going to be evidence of things that your common sense will always keep you in light about.

The evidence will be if direct smoking can cause disease, obviously environmental tobacco smoke, secondhand smoke causes disease.

MR. UPSHAW: Objection, Your Honor.

THE COURT: Overruled.

MR. HUNTER: Another witness that I will call and present to you will be a pilot for Eastern Airlines, who took photographs of the outflow valve of the airplanes that he flew on Eastern Airlines.

And you will see visually, and I can't remember, as I'm seeing each one of you, who flew in the days when smoke was on planes and who didn't, but you will see a photograph taken by a pilot who has no connection with this

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lawsuit of an outflow valve on an airplane back in the days when smoking was allowed, which shows a, just a huge trail, a smoke trail of brown tobacco tar that comes out the outflow valve.

I'm going to bring for you flight attendants who, when I say back in the old days, because I'm trying to recreate for you something that hasn't existed domestically in domestic aircraft in 10 years and hasn't existed in five years on international flights. I'll bring in people who actually saw it, people who smelled it, people who worked in it, people who can tell you what it was really like.

Dr. Burns was an unpaid witness. The Surgeon General had never testified before in a courtroom.

I will also bring Dr. Hammond. Dr. Hammond was a scientist -- and her name is Katherine -- was a scientist on behalf of the Occupational Safety and Health Administration or the National Institute of Health or the Environmental Protection Agency or, both, or all, who is one of the only people without an

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ax to grind, without being hired by the tobacco companies or anybody else, actually studied flight attendants in -- or actually studied secondhand smoke on flight attendants.

And she will testify that a five-hour flight is equal to a half a pack of cigarettes, in terms of cigarette equivalents for a flight attendant, who -- and you'll hear testimony about a flight attendant is much more active than the passengers, because she's running up and down the aisle, she's bringing meals to people, she's working, she's bending over. And her respirations rate has increased as someone who is doing some level of activity; that every five hours in the plane, that's about equivalent, in cigarette equivalents, to her smoking a half a pack of cigarettes.

And according to Marie Fontana's flight time for 20 years, these long transAtlantic flights, with a lot of -- depending on the season, would have, sometimes she would be down in South America, sometimes she would be in North Africa, sometimes she would be in Europe. But depending on the season you either have people coming to the United States because it

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was their vacation or you had people from the United States going to the far away destinations because of their vacations or travel plans.

But these were always full flights because transAtlantic flights are usually full, and they had a high volume of people who smoked on the plane. So this is a high exposure to this. And probably it's higher than that.

But if we figure out her flight time as best as we can, and I'm sure the tobacco companies will dispute this, but if we figure out in cigarette equivalents, it's between 38,000 to 40, over 40,000 cigarettes that she was -- would have smoked to get this type of exposure, based on her 20 years experience on these long smoking flights.

Now, the defendants will of course present their witnesses. And one of the things that one of the defenses will be that, by paid experts that they've hired, they hired one expert to make a video of an airplane to show the way the air circulates inside and paid $250,000 --

MR. GERAGHTY: Objection, Your Honor.

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THE COURT: Overruled.

MR. HUNTER: -- to try to impress on you the position that these planes were highly ventilated. There was a very efficient system, and therefore there really couldn't have been too much smoke in there, because they have an air exchange every five or six minutes, and there used to be fresh airplanes.

And I ask you to listen carefully to their experts, their retained experts that they've paid this money to, and weigh it against the people who were there, to see what you feel in your good, common sense the exposures really were.

The evidence will be that they have hired a gentleman, who is well qualified, who will testify to you -- and I have to address, I feel it's my obligation to suggest to you what all the evidence is, not just mine -- a very well qualified doctor, very good qualifications, who says that, despite the Surgeon General and the National Institute of Health and the National -- or the American Cancer Society and everybody else, it hasn't been proven yet that environmental tobacco smoke causes disease in

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healthy nonsmokers. He doesn't say it doesn't. He just said, well, it hasn't been proven yet.

And when you hear that testimony, remember also that you are listening to it with the presumption or with the rebuttable presumption that it does, as instructed by Judge Wilson.

Now, at the risk of stating the obvious to you, as though the witnesses that you will see in this case, I will bring to you, the Surgeon General, Dr. Charles Irvin, Thomas Petty, Dr. Foley, I'm going to show you the X-rays. In addition, I ask you to also consider that the evidence will also be that smoking is banned finally on airplanes. Smoking is banned in this courtroom, this courthouse, in hospitals; it's banned all across the United States in places where it can affect the health of people, especially people that are predisposed or have another illness, another lung disease.

So listen as you hear the evidence, listen carefully to the tobacco attorneys when they give their presentation, listen carefully to them, give them your full attention. But keep your common sense next to you as you hear all the evidence in the case. And then I'll have

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an opportunity once again to speak directly to you in my closing remarks at the end of the case.

Thank you.

MR. GERSON: May it please the Court, ladies and gentlemen of the jury. Despite all the fuss, what it really will come down to is just a basic common sense judgment on your part of what makes sense. So you're going to hear some pretty highly qualified doctors and other experts testify in the trial. Don't let any of that intimidate you, don't let go of your own common sense and good judgment, because those are the things that are going to lead you to the right outcome for this case.

Now, as you already know, there's two issues: Legal causation and damages. And so we will be asking you to agree that involuntary tobacco smoke was a competent producing cause of disease in our client, and we will ask you to say how she has been damaged in dollars and cents.

To answer these questions, you will have to value the loss of someone's loss of enjoyment of life, the pain and suffering and

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anguish of the deterioration of health and life itself, and the value of the loss of her life.

And this will be an awesome responsibility. It will be a challenge unlike any that you have ever faced in your lives before.

MR. UPSHAW: Objection, argumentative.

THE COURT: Sustained. Move on.

MR. GERSON: There will be no other opportunity for justice for my client, your verdict in this case will have to measure the life.

MR. UPSHAW: Objection, argumentative.

THE COURT: Sustained. Let's move on.

MR. GERSON: At the end of the trial I'll have another opportunity to address you in the closing argument, and I'll try and help you reason through the evidence that's been presented during the trial and arrive at a fair and just amount of damages for my client.

Now, it's normal to expect evidence of fault. But as you already know, none will be presented in this case, there will be no evidence of fault by the defendants, there will be no evidence of fault by the plaintiff and

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there will be no evidence of fault by the airline that she worked for or by anyone else.

I tell you this now because it is only human to wonder or to speculate about who was at fault. And I'm explaining this to you so that you understand what your role as jurors in the trial will be.

So now that I've explained what you won't be asked to decide, let me go back and talk with you for a few moments about what you will be asked to decide.

The first issue will be whether involuntary smoke was a legal cause of her condition. Now, I say legal cause because as you've already been told, it need not be the only cause. It will be enough if you find that the involuntary smoke acted in combination with other causes, so long as it can be said that but for the involuntary tobacco smoke, Marie Fontana's condition would not exist as it does today.

To put it another way, if the secondhand smoke aggravated, that is to say, made it worse, or if the secondhand smoke accelerated that, is to say, made it progress faster, or

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both, then Marie would be entitled to recover damages from the four tobacco companies who are the defendants.

Now, these four companies are the defendants in the trial because between them they manufactured and sold the majority of popular brands of American cigarettes that were sold on the flights that Marie Fontana worked on.

MR. UPSHAW: Your Honor, objection, may we be seen at sidebar on this issue?

THE COURT: No, sir, overruled.

MR. GERSON: Let me get back to the causation issue.

Like I said, it's enough to aggravate or accellerate or act in combination with other diseases. I'm telling you this so you understand what we will be proving with our evidence and what we will not be required to prove.

So we will not prove that secondhand tobacco smoke, to the exclusion of all other factors, was involved. We will only prove that the secondhand or involuntary tobacco smoke was a legal cause of the injuries and damages that

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she has.

You will be asked to apportion between the two which was caused by involuntary tobacco smoke and which was not.

Now, I already know what the evidence is because I've been to the depositions or read the depositions of all of the witnesses who are going to testify.

MR. REILLY: Objection, Your Honor.

THE COURT: Overruled.

MR. GERSON: And we know that you will be unable to make the apportionment. And under the law you will be asked to --

MR. REILLY: Objection, Your Honor.

THE COURT: Overruled.

MR. GERSON: And under the law, you will be asked to allow for the entire condition in your verdict, if you are unable to make the apportionment.

Now, we will ask you not to feel sorry for the tobacco companies if you can't make this separation in the damages, because your job is simply to follow the law, based on the evidence, apply the law that the Judge gives you, and to be faithful to the oath that you

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took earlier this morning.

You already know that Marie Fontana has a condition known as sarcoidosis. And we've told you that we cannot prove that sarcoidosis is caused by smoke just as the tobacco companies cannot prove that it is not.

Marie Fontana's sarcoidosis was diagnosed in the late '80s. This was recognized. And then after that, no one else looked any further to determine if there was something else involved.

At the time of the original diagnosis, nothing was known about the harmful effects of secondhand tobacco smoke. And so the questions of whether secondhand tobacco smoke played any role at all in the extensive and prolonged exposure that Marie Fontana had, which led to the diagnosis ultimately of a sarcoidosis, was never asked.

No one asked those questions. But as years went by, more and more became known about secondhand tobacco smoke. We learned about the harmful effects of secondhand tobacco smoke on human health. And it's only just recently that the tobacco companies in this trial finally

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stopped denying that direct tobacco smoke caused pulmonary illness and disease.

Now, armed with the knowledge that direct tobacco smoke can and does cause respiratory disease, we will prove in this trial that secondhand smoke causes the very same diseases, too.

So we had experts, some of whom Steve has talked with you about already, look at Marie Fontana's medical records and at her X-rays. And what they will tell you in this trial is that Marie has more than just sarcoidosis. They will say that she has chronic obstructive airway disease, or COPD, which is sort of a category rather than a particular disease, and one that includes bronchitis and includes emphysema.

The defendants will say that Marie's doctors did not make this diagnosis according to their records. And they're right. But the fact is the truth is that Marie's doctor never found it because he never looked for it.

Better trained experts who will testify in this trial will show you that it was there all along in the data that was recorded in the

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records and in the X-ray films. You will see it with your own eyes and you will hear it explained by these preeminent doctors during their testimony in the trial.

Now, let me say that pulmonary and respiratory medicine is complex. But I think I can make it very simple and break it down to its most basic terms. Sarcoidosis is a condition that causes scarring in the lungs, as Steve just explained, which interferes with a person's ability to breathe in air and have the gas exchange of oxygen for carbon dioxide take place.

COPD is a condition that interferes with a person's ability to breathe out air and exchange carbon dioxide for oxygen.

In Marie Fontana's case, no one can prove what caused the sarcoidosis or the breathing in problem. But we can prove and we will prove that involuntary cigarette smoking caused the COPD or the breathing out problem.

Highly qualified doctors who will testify in the trial will say that without the COPD, Marie's sarcoidosis would not threaten her life. They will say that without sarcoidosis,

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Marie's COPD would not threaten her life. But the combination of the two diseases means that Marie Fontana will not get better.

Marie Fontana has a death sentence. Her condition is terminal. It will take her life. With a double lung transplant, if she can get it, she may get a stay of execution of five, maybe even ten years. But even the defendants and all of their doctors will agree that the outcome for Marie is not in doubt. Our client will die from the deadly combination of these diseases. And but for the tobacco smoke, she would have lived out a normal life.

Now, as you've already been told, our client is not here in court. That is not because she doesn't want to be here, it's because she is too sick to be here.

Marie's breathing problems are so severe that she needs oxygen from a tank pumped in through her nose just in order to survive. The tank is cumbersome and it has a limited supply of oxygen, without which she cannot manage.

If your car runs out of gas, your car will stall until you put more gas in the tank; but if the oxygen tank that keeps Marie Fontana

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alive runs out, she will choke to death. Because of this, she is totally disabled and she cannot work or enjoy her life like a normal person.

Nevertheless, you will get to meet her during the trial. She will appear briefly, and we will ask the Judge for permission to let her testify for short periods, with rest time in between, so that you will get to see for yourself, firsthand, what she is like. And you will get to understand her struggle.

Now, part of my job, as we break down the labor between the lawyers in this case, will be to help you understand how the poison of the secondhand smoke has affected Marie's life.

As Steve said, Marie has many friends. Some of them are flight attendants, and we will call some of them to testify during the trial over the next few weeks. We will not call them merely because they were friends, but we will call them because they are people who have had an opportunity to know Marie both before this happened and afterwards.

So this before and after analysis will be much of what the trial is about: What she has

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lost, how she has been harmed and what the future holds for her because of this illness, will be some of the questions that we will ask you at the end of the trial.

The evidence will show that there are tens of thousands of dollars of medical expenses which, if she gets the transplant, will become hundreds of thousands of medical expenses when all the future costs are added up. And that's just the past and future doctor bills and hospital bills.

Another issue will be how Marie's earnings in the past and her ability to earn money in the future has been affected.

The evidence will be undisputed that she has not worked since December of 1996, that she was forced to give up a job she liked enough to spend her whole life doing it.

Marie has lost and will continue to lose not only income, but the benefits from the very good job she had because of the poison and smoke.

Since there is no evidence from the defendants that will controvert any of these points in the case, we will not even bother to

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call an economist or other kind of expert to testify. Instead we will rely on Marie to explain what she had in her job and what she has lost forever.

Now, thank goodness none of you has ever had to face organ transplant.

MR. REILLY: Objection.

THE COURT: Sustained.

MR. GERSON: So this trial will be a learning process for you about this cutting edge and hopefully life prolonging procedure.

You will learn that there are four stages to the transplantation process. The first is evaluation. Marie has completed this part, and she will tell you about the lengthy comprehensive and exhaustive screening, testing, examination and counseling that she's had to go through.

The second phase is waiting. She's been waiting since the fall for this life saving help that may or may not come in time. She wears a beeper so that if a suitable donor is found, she can be notified to go to the hospital at once. So far the beeper hasn't gone off. She has no control over whether or

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not it will summon her before it's too late.

The third stage is the surgery itself, a major surgical procedure where her sarcoid and smoke contaminated lungs will be removed and discarded in favor of unpoisoned healthy lungs from a donor.

And the fourth stage is the long-term care. You will learn how a transplant recipient must take medications that work to suppress the body's natural system from rejecting the transplanted lungs. Unfortunately, these medications have many side effects, such as high blood pressure and diabetes.

A transplant recipient is also at greater risk for infections and cancers. All of this places extraordinary demands on the lifestyle of a transplant recipient. There are frequent tests to make sure the transplanted lungs are functioning well.

And you will learn that it is a lifetime process, its many complicated and invasive components cannot ever be discontinued once they're started.

If the alternative were not the severest

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imaginable sanction, the loss of a life, Marie would never consider such a drastic undertaking. Her fear and anxiety over facing this option, which has been forced upon her through no fault of her own, will be talked about later in the trial, when we discuss the amount of her damages.

As I've said, the evidence in the case will at times seem complicated, but in the final analysis it will be something for you to decide based on your own common sense and experience.

Why did she have to be made sick when she was just doing her job? What verdict would equal justice for what Marie Fontana --

MR. REILLY: Objection, Your Honor.

MR. GERSON: -- has lost --

THE COURT: Sustained.

MR. GERSON: -- that is the ultimate question we will ask you at the conclusion of the trial.

THE COURT: Ladies and gentlemen, I think it's appropriate to take about a five- or ten-minute recess. Then we'll hear the defense opening statements.

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So I'll let you just leave your note pads on your chair and come back up here in ten minutes.

(The jurors exited the courtroom.)

MR. REILLY: Your Honor, I'd like to move for a mistrial at this time on four bases.

First is this mention of the sinus surgery. There is no evidence, there will be no good faith statement.

The second is the false burden of proof that Mr. Gerson represented, that we can't prove that sarcoidosis wasn't caused by environmental tobacco smoke. We never have had, never will have such a burden of proof.

The third was the statement by Mr. Hunter that there will be evidence in this case that someone was paid $250,000 to prepare a video. There will be no such evidence like that in this case.

The witness lists have been established. There is no one on any witness list to make such a statement.

And finally -- and Mr. Hunter knows that. And finally, and the most grievous of them all, was Mr. Gerson's reference just a moment ago to

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ask them to put themselves in the place of someone who is going to have a lung transplant.

You sustained the objection. I now move for a mistrial.

THE COURT: I'm going to deny it.

MR. HUNTER: Judge, when you get back, can I take up an issue with you?

THE COURT: I'm going to recess.

(Judge Wilson exited the courtroom.)

MR. McCARRON: On Thursday we're going to call Dr. Irvin. And we're going to be using Ms. Fontana's medical records and X-rays and CT scans. We're also going to be just calling Carolyn Hurley, who is a flight attendant. The only thing we'll be using with her are the flight attendants', or the airplane seats and any of the paraphernalia that goes along with that, in the sense of the trays and forks and plates and stuff like that.

And then the videos, we're putting Hammond, Dr. Burns and Dr. Richmond. And the only thing we'll probably be moving in the Surgeon General Reports with either Dr. Burns or Dr. Richmond.

MR. GERAGHTY: Which Surgeon General

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Reports?

MR. McCARRON: Whatever we have over there, definitely 1986, probably 1979, but any ones that they've mentioned in their testimony.

I know that Dr. Richmond discusses the 1964.

MR. ENGRAM: The ones that are over here are '86, '89, '64, '79.

MR. McCARRON: Those are the only ones.

(A recess was taken.)

MR. HUNTER: Judge, one issue on the time line. I didn't understand why it was on here that she worked for Andy's Realty for three months and that she attended the Gold Coast School of Real Estate. Someone in the audience that's smarter than I am, said: That might give them the argument that she could have taken another job.

MR. REILLY: Stop. I'm not going to make the argument.

THE COURT: Mr. Hunter, hold on, stop. I'm going allow the use of the time line.

MR. ENGRAM: Your Honor, one other thing. We had discussed with the Court the videotape testimony and the ability to review the

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videotapes to insure that the portions had been redacted that the Court ordered be redacted or had ruled on. And we've not yet been able to obtain a copy of the edited videotape from Mr. Hunter. And he plans to play them tomorrow.

MR. HUNTER: Judge, I told him I'd give him plenty of advance notice. We had it digitalized so that the engineers can -- I don't know, it's different than just a tape. They digitalize the whole transcript and then coordinate that with the film. And Mr. McCarron's job is to make sure that everything that we ruled on is on the digital version. And we will give that to them well in advance for them to review it and object or correct anything that we did improperly. And we've been working on that from the moment you ruled on it, had to put the transcript into this digital computer so that they can do the edits.

THE COURT: You'll get it as soon as possible.

Are we all ready to go?

MR. REILLY: Judge, are you going to --

THE COURT: I'll give you the full hour and thirty minutes.

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MR. REILLY: I want to know if you're going to hold them until 5:30.

THE COURT: Yes. We're going to do it all at one time.

(The jurors entered the courtroom.)

THE COURT: Make yourself comfortable. Let the record reflect that all the jurors are present.

Ladies and gentlemen, the defense is going to give you their opening statement. It's again an hour and a half. It will be right around 5:20 by the time you get to go, and I apologize for that. Usually it will be around 5:00, maybe a minute or two before or after.

MR. ENGRAM: Your Honor, may I proceed?

THE COURT: Yes.

MR. ENGRAM: May it please the Court. Counsel. Ladies and gentlemen of the jury.

My name is Jonathan Engram. We met yesterday. And I want to talk with you about the issues that you'll have to decide in this case. But I need to get my Magic Marker.

I'd like to start off, though, talking about what the case is not about. We spent a lot of time yesterday asking you questions in

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voir dire about your experiences and your feelings and your beliefs, things about cigarettes and environmental tobacco smoke that you know and beliefs that you held.

But many of the things we talked about in voir dire are not going to be issues in this case. This case is not about whether cigarette smoking causes disease. This case is not about lung cancer, it's not about addiction, it's not about whether cigarettes should be outlawed. It's not about whether you have to like or dislike tobacco companies. And it's not about whether people should be permitted to smoke in offices or in courthouses or in restaurants or in your own home.

What the plaintiff has in this case is the burden of proof to prove, by a greater weight of the evidence, three issues. And I want to spend some time talking with you about these first two issues. But the issues that the plaintiff has to prove -- and I've got to try to set this up where it doesn't block everybody and doesn't -- so I can see it.

But the issues in this case that the plaintiff has to prove -- and this comes not

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from me, but from the Judge -- the Judge said, first, the plaintiff has to prove to you what lung disease she has.

And the second thing that she has to prove to you is that environmental tobacco smoke was the specific cause of that lung disease. And I'm going to shorten here. But when I talk about environmental tobacco smoke, I'm talking about ETS. Everybody with me on that? Environmental tobacco smoke was the specific cause of her lung disease.

Now, another way you can look at specific cause, ladies and gentlemen, is to think of it as cause in fact, did environmental tobacco smoke in fact cause that lung disease? And that is the plaintiff's burden of proof in this case.

And so when you review the evidence, when you listen to the evidence at this trial, keep in mind these two questions, and try to answer these two questions when you hear the testimony and review the exhibits that get introduced.

The third issue that the Court talked about, and you decide this only if you find that the plaintiff has a lung disease that was

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in fact caused by exposure to environmental tobacco smoke, you would then decide what Mr. Gerson was talking about, the issue of damages.

So, let's see, what do you base your decision on? They want you to base your decision on common sense. But ladies and gentlemen, the Judge is going to tell you that you base your decision on the evidence presented to you in this courtroom, the evidence presented to you from this witness stand, or from videotape testimony of witnesses, or from deposition testimony of witnesses that is read to you in court.

The other aspect of the evidence that you will decide these two issues on are written exhibits and documents introduced into evidence and taken back with you into the courtroom.

You will not make your decision on these two issues: What lung diseases does she have, were any of them caused by exposure to environmental tobacco smoke? You will not make those decisions based on anything you heard on T.V., anything you read in the newspaper, anything you heard on the radio, anything some

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doctor may have told you, anything some friend may have told you, and anything, any emotion or sympathy that you may feel for Ms. Fontana.

We all feel a great deal of sympathy and emotion for Ms. Fontana. She has an advanced stage of this disease that no one knows what causes it. It's so serious that she's on a list to receive a lung transplant.

But sarcoidosis, and this is undisputed, the cause of sarcoidosis is unknown. Ms. Fontana knows that, her lawyers know that. Every doctor that will testify in this courtroom will tell you that. And there's no dispute about that fact. So your job as jurors is to put aside any sympathy you might have for Ms. Fontana and for her condition and decide the issues in this case based on the evidence that comes from the witness stand and the documents that you review.

And that's just how our system of justice works in this country.

Let me talk a little bit some of the examples or exhibits or documentes that are going to be introduced at this trial.

You're going to have to review a number of

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Ms. Fontana's medical records. And we also have some records and charts that show what her flight schedules were like for some of the years that she flew. We have TWA flight logs that will show how often she flew and where she flew to. And we have them for the years 1993, '94, '95 and the last year she flew, 1996.

Let's talk a little bit about these two issues now.

The very first one: What lung disease does Ms. Fontana have? You've heard the term "sarcoidosis". I didn't know what sarcoidosis was before I was involved in this case. And I think through our questions yesterday none of you had either.

But sarcoidosis is what doctors call a systemic disease, which just means that it's a body -- it's a disease that gets in your body and spreads throughout your systems. It spreads throughout your circulatory system, your bloodstream, it spreads throughout your respiratory system or your lungs. It spreads through your lymphatic system. And so sarcoidosis can involve more than one part of your body. Sarcoidosis can involve your eyes,

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it can involve your lungs, it can involve your kidneys.

In the eyes, a person with sarcoidosis gets a condition that you'll see and hear about called uveitis, which is just an infection in the eye caused by the sarcoidosis. The reason you'll know that is that Ms. Fontana had that condition as a result of her sarcoidosis.

In patients with sarcoidosis in their kidneys, the calcium accumulates and they get what are called kidney stones. And again, Ms. Fontana had kidney stones as a result of her sarcoidosis.

But let's look at how sarcoidosis affects the lungs. Because the real culprit here in this case is what sarcoidosis is doing to Ms. Fontana's lungs.

Sarcoidosis in the lungs, and when you look at the medical records you'll see two different terms, you'll see scarring, or fibrosis. Those two words mean the same thing. Sarcoidosis causes fibrosis, which is a medical term that doctors use for scarring.

And what happens when your lungs become scarred because of the sarcoidosis is that it

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restricts, and "restricts" is a key word in this case, the scarring restricts the ability of the lungs to work by reducing how much capacity your lungs have.

If you think of it very simplistically, restrictive lung disease means that you cannot breathe in. An obstructive lung disease means that your lungs have difficulty breathing out.

And we'll talk about some of these obstructive lung diseases that the plaintiffs now claim Ms. Fontana has in a moment. But I want you to remember one very important thing about sarcoidosis, and that is that the scarring makes it a restrictive disease.

Now, there will be talk about Pulmonary Function Tests. Pulmonary Function Tests are complicated tests where you breath in a tube and they measure how hard you can breath in and how hard you can breath out. "Pulmonary" is just the medical term for "lung". And when you talk about a pulmonary doctor or a pulmonologist, all he is is a doctor that treats people with diseases of the lung.

And a doctor, a lung doctor, can tell from Pulmonary Function Tests whether a patient has

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restrictive lung disease or obstructive lung disease.

Now, some of the other things that the scarring causes is that a patient's lungs bleed. And you will hear that Ms. Fontana had an episode in late 1996, in early January 1997 with what doctors call hemoptysis. But hemoptysis is simply coughing up or spitting up blood. That's caused by the scarring in the lungs.

You'll see that in December of 1996 Mrs. Fontana was hospitalized because she was spitting up blood.

There are other things that the sarcoidosis does. The sarcoidosis in Ms. Fontana has developed a fungus. And this fungus has been found in her lungs by her doctors, and there are different types of fungus, and you'll see in the medical records fancy words like aspergilloma or myocytoma to describe these funguses that are growing in her lung. It's really called fungi, so if you hear a doctor talk about fungi, that means two funguses.

So let's review what some of the things

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that happened as a result of the scarring and sarcoidosis.

Some of the other things that you get is short of breath. It's just like you ran up a set of stairs and, you know, that kind of feeling that you have when you get to the top of the stairs, you're breathing quickly and you really are trying to grab your breath.

Well, the scarring causes Ms. Fontana, with activity, to become short of breath. The scarring causes her to cough. I think that you'll see, when she comes in and testifies before you, that she sometimes gets a cough. And she sometimes will get what they call sputum production or phlegm. And that's just when you, you cough so hard that you try to bring up -- when you had a chest cold, everybody has had a chest cold, I'm sure, when you cough so hard, just trying to clear your chest, clear your throat. That's what sputum or phlegm is.

And those are some of the symptoms that people get, that people get with sarcoidosis.

Ms. Fontana had all of these symptoms -- the blood, the coughing up the blood, the

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shortness of breath, the fungus, the kidney stones, the eye infection, the sputum production. All of these symptoms were symptoms that were expected complications in a patient with advanced sarcoidosis.

Now, the fact that the plaintiff has a lung disease called sarcoidosis doesn't entitle her automatically to recover money from any defendant. The plaintiff has the burden of proving that the lung disease that she has was in fact caused by or aggravated by her exposure to ETS on airplanes when she was working as a flight attendant.

So what evidence will you hear from this witness stand or read a document about what causes sarcoidosis or what aggravates it or worsens it? The cause of sarcoidosis is not known. That is the evidence that you'll hear.

The evidence you will hear is that it's not known what causes or aggravates or worsens it. In fact, the plaintiff's own treating doctor, Dr. Coopersmith, the lung doctor in Boca Raton, when he first saw Ms. Fontana, he told her, on the very first office visit in April of 1995, there is no known cause to your

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disease.

You know, sarcoidosis is somewhat rare, but it's not something new. It's something that's been around over a century. It's something that doctors and scientists have studied over 100 years. And the American Thoracic Society -- "thoracic" is just another medical term for your chest. But the American Thoracic Society, one of the country's leading organizations on chest and lung disease, has published a statement on sarcoidosis. They've also published standards with respect to COPD, or chronic obstructive pulmonary disease. And you will hear testimony in this trial from a former president of the American Thoracic Society, a Dr. Rowell and Ingram from Atlanta, Georgia, from Emory University School Of Medicine.

What's interesting about this statement on sarcoidosis is that it's intended to tell doctors the things we know. They have a chart on the first page of this statement, and it says: Here are the things we know about sarcoidosis. And here are the things we don't know.

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Well, right on that chart published by the American Thoracic Society are three things, there's more than three things, but three things that are important in this case: One is that we don't know what causes sarcoidosis; number two, we don't know how it is the disease progresses or becomes advanced in people; basically, we don't know why it gets worse. And there's no test to say who with sarcoidosis is going to get a progressive or a worsening form of the disease.

So we don't know. Doctors and scientists in this country after 100 years don't know what causes sarcoidosis, they don't know why it progresses in certain, in people to get a progressive form of the disease that get worse with sarcoidosis. And there's no test that they can do to tell you, when you first get it, whether you're going to be one of those unfortunate 20 to 15 percent of the people with sarcoidosis that's going to get advanced or worsened form of sarcoidosis.

Now, I said that there's another chart in this, on this first page from the American Thoracic Society that sets out the things we do

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know about sarcoidosis. We do know what these features and symptoms are, shortness of breath and coughing and the funguses.

We do know that steroids are an effective short term treatment, that Ms. Fontana has been taking these steroids. But we don't know why steroids don't work forever. And that's been Ms. Fontana's problem.

And one of the other things that we do know, that doctors have studied, whether smokers or nonsmokers are more likely to get sarcoidosis.

Now, think about this for a minute. If active smoking, people who smoke cigarettes, if active smoking causes sarcoidosis, then wouldn't doctors expect to see sarcoidosis more often in people who smoke? If that was your theory, smoking causes sarcoidosis, then you'd expect to see more smokers with sarcoidosis than nonsmokers.

But the opposite is true. People who smoke don't get sarcoidosis. They're less likely to get sarcoidosis.

And this is not coming from me, ladies and gentlemen. This is coming from the American

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Thoracic Society. Sarcoidosis occurs more commonly in nonsmokers than in smokers.

Let's talk a minute about the different kinds of experts who are going to testify in this case. There are two kinds of doctors, we have medical doctors and then we have this other group of doctors called Ph.D.s.

Now, the shortened version of medical doctor is simply M.D., the abbreviation for a doctor of philosophy is Ph.D. And it's very important, because we call both of these people doctors, that you understand when a witness is testifying whether they're an M.D. or a Ph.D.

Now, M.D.s are doctors who go to college for four years, they go to medical school. Depending on when they went, they either go for three years or four years. They do a one-year internship. They do three years of residency, and pulmonologists do another two years of study, which they call a fellowship, so that by the time you go into private practice as a pulmonologist, you've spent 14 years, after you graduated from high school, studying to be a doctor. 14 years.

Now, Ph.D.'s have also done a lot of

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studying. They have gone four years to college, they've been in a Master's degree program for at least two years, again depending on whether they're in chemistry or toxicology or physiology. And then they would have two or three more years in a doctoral program in their specialty.

But we call both of them doctor. What's important is that only medical doctors can diagnose disease. Only medical doctors can treat patients.

That's not to say that a doctor who is a chemist doesn't have a lot of information that will be helpful for you to understand in this case, it's just that when you hear testimony from a doctor who is not an M.D., understand that that person can't diagnose disease and can't treat patients with disease.

Now, let's look at some more of the evidence in the case. I said before that a doctor that treats patients with sarcoidosis is a lung doctor or pulmonologist. And the plaintiffs, because they cannot establish ETS in fact caused her sarcoidosis, now claim that somehow ETS aggravated or worsened her

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sarcoidosis.

And what's the evidence going to be in this case about any sort of worsening of the sarcoidosis? Well, you'll hear the testimony of plaintiff's own hired expert witness, Dr. Christopher Breeden.

Dr. Christopher Breeden isn't a lung doctor, he is a pulmonologist. He went through those 14 years of extra training.

The other kind of doctor, there are two kinds of -- there are two more kinds of doctors in the case, two kinds of experts. One is simply somebody who treated Ms. Fontana, but these other experts are people who are hired or retained by the plaintiff or by the defendant who never saw Ms. Fontana.

Now, plaintiff has three such hired experts in this case. They have Dr. Breeden from Boca Raton, a lung doctor. They have Dr. Foley from Tampa, and he's an X-ray doctor or radiologist. And they have Dr. Irvin, who's a scientist. He has a Ph.D., not an M.D. And he's from Vermont.

When you listen to the testimony in this case, I'd ask you to pay close attention to the

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testimony of plaintiffs' own expert, Dr. Christopher Breeden, the lung doctor, the only expert lung doctor that they brought in to this case, because Dr. Breeden will tell you that environmental tobacco smoke did not cause or aggravate or worsen Ms. Fontana's sarcoidosis.

I don't know if I mentioned this earlier when I talked about Dr. Ingram, the former president of the American Thoracic Society from Atlanta, but my last name is Engram, but my name I start spelling it with an "E", Dr. Ingram in Atlanta starts spelling his name with an "I". So we're not related and I didn't want you all to think that that might be the case.

There are two lung doctors that Ms. Fontana saw. And you'll have the medical records from these two doctors. Now, they may both testify, but I'm not convinced of that.

There's one doctor, Jonathan Green. And he is -- he was her doctor, he was Ms. Fontana's doctor from 1989 to 1995. And then her second doctor, her current doctor, is a doctor named Edward Coopersmith. And he has

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been her doctor from '95 to the present.

When you look, and while we have a lot of medical records in the case, Ms. Fontana went to this lung doctor in the six years from 1989 until 1995 six times.

Now, I don't say this because I want you to think Ms. Fontana wasn't sick. There's no dispute that Ms. Fontana had sarcoidosis. But what I want you to pay attention to is on those six visits, what was she complaining about and did she ever complain about environmental tobacco smoke exposure making her conditions worse?

When you look at those six office visits from Dr. Green from 1989 until 1995, you will see no entry by Dr. Green that says Ms. Fontana's exposure to ETS caused her sarcoidosis to worsen.

From 1995 to the present, Ms. Fontana's doctor is Dr. Coopersmith. And there's a date, another date that you need to remember, and that is December 1996, because in December 1996 Ms. Fontana stopped flying.

Now, I want you to go back and look at the records of Dr. Coopersmith. For those two

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years in 1995 and 1996 when she was still flying in 1995, she saw Dr. Coopersmith four times. And in 1996 she went to his office only three times, once in April and twice in December.

And remember, it was in December of '96 that she got the bleeding and had to be hospitalized.

But if you look at those records for Dr. Coopersmith from 1995, those four times and the three times in 1996, you'll see no entry by Dr. Coopersmith that says Ms. Fontana's exposure to environmental tobacco smoke in the aircraft cabin in fact caused, aggravated, exacerbated or worsened her sarcoidosis.

You know, when Ms. Fontana went to see Dr. Coopersmith the first time, she did tell him that she becomes more short of breath with exertion on flights. And she said: Especially if I'm in the smoking section. She also said that: I get more short of breath at higher altitudes -- when you're higher up in the air.

But there's no suggestion in the record that this was anything other than a temporary symptom. And there's no suggestion that it in

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any way ever aggravated her or worsened her sarcoidosis.

Another thing you should look for in these doctor records, Dr. Green and Dr. Coopersmith, you'll find there's no entry, no suggestion that she not work as a flight attendant. Instead, this is what you'll see when you review the records, September 11, 1995, she gets somewhat more short of breath when she flies to Denver, Colorado, the Mile High City, or when the plane reaches 44,000 feet. Otherwise she is doing well.

April 12, 1996, Dr. Coopersmith said: She's able to work essentially with no difficulty. And even as late as December 1996 Dr. Coopersmith said: The patient is able to perform her duties as a stewardess on overseas flights.

My point isn't that Ms. Fontana isn't sick. My point is that exposure to ETS did not make her sick.

Dr. Ingram retired this year from Emory University School of Medicine. He had been a lung doctor there from 1967 until 1973, and then he went back to Emory in 1992 until his

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retirement last year. In between, from '73 to '89, Dr. Ingram was a professor of medicine at Harvard Medical School in Boston, Massachusetts, one of the best medical schools in the country.

Now, Dr. Ingram has been the director of the pulmonary division at Emory hospitals and at Harvard's affiliated hospitals, he's been in charge of the pulmonary units and doctors there. He's trained doctors, and he still trains them in his retirement. He trains doctors who specialize in lung disease.

He has treated patients, thousands of patients with lung disease, and he's treated patients with sarcoidosis.

And as I said earlier, the same group that published the statement on sarcoidosis, he was president of in the mid '80s.

Dr. Ingram also writes the chapter in an internal medicine textbook used in the majority of medical schools in this country. It's called Harrison's Principles of Internal Medicine.

And do you know what he writes the chapter on in that book? He writes the chapter on

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chronic bronchitis, emphysema and chronic airway obstruction.

Remember, the diseases that Judge Wilson told you about in your preliminary charge, you need to find out, you need to decide from the evidence in this case whether Ms. Fontana had chronic obstructive pulmonary disease, emphysema, chronic sinusitis or chronic bronchitis.

Now, Dr. Ingram has reviewed all of Ms. Fontana's medical records, all of her pulmonary or lung function tests and some of the deposition testimony in this case.

And you will hear him testify, consistent with her medical records, consistent with Dr. Breeden, the pulmonologist, that the plaintiffs hired from Boca Raton, that Ms. Fontana's exposure to environmental tobacco smoke did not cause or aggravate or worsen her sarcoidosis.

So let's look at these other diseases. And I don't know, the plaintiffs talked a little bit about the nasal passage and the sinuses and things like that, and I really can't tell whether they're going to claim that

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Ms. Fontana also had chronic sinusitis. But let's look at what chronic obstructive pulmonary disease is.

COPD. COPD. And I said before, remember that we need to keep track of what restrictive diseases you hear about and what obstructive diseases you hear about, because sarcoidosis is a restricttive disease.

And so some of the evidence that you'll have to look for is whether she had any evidence of obstructive disease, which would be different from the sarcoidosis.

But COPD is an obstructive disease due to bronchitis or emphysema. Again, this is not my definition, this is the definition of the American Thoracic Society. And it's due to chronic bronchitis or emphysema. Chronic.

What do we mean, what do doctors mean by the term "chronic"?

Well, chronic is different from acute sinusitis or acute bronchitis.

"Acute" means sudden or short duration. Now, doctors, when they talk about something being acute and being short, they usually mean less than four weeks. I think that's a long

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time to have something that they call acute, but that's the definition of "acute". Something that you've had for four weeks or less.

"Chronic", on the other hand -- and in order to really know what COPD is, I have to tell you what chronic bronchitis and emphysema is. But chronic bronchitis is a disease that produces chronic productive cough.

When I say "productive," I mean that you're spitting up phlegm or whatever, but cough for more than three months, twelve weeks or three months, and for two consecutive years, so that you have to have it for three months in 1995 and three months in 1996. And other causes of this chronic cough have to be excluded. That's the definition of chronic bronchitis.

Well, do we know why Marie Fontana may have a cough? Sure we do. She's got these fungus growing in her lungs, she's got this restrictive disease that's caused by the scarring. And does she have anywhere in her medical records three months' worth of a cough in two consecutive years? You will never find

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the diagnosis anywhere in the records of her lung doctors that she had chronic bronchitis. You will never find anywhere in the medical records of her lung doctors that she had emphysema.

You want to know why they didn't diagnose her with emphysema? Well, emphysema -- and we talk about these, the doctors will say that it's an abnormal enlargement of the air spaces. So you have enlarged air spaces. And you can see those on X-ray. And you can see the scarring from sarcoidosis on X-ray. And you have enlarged air spaces. You have destruction of the walls so that they become open areas with emphysema.

But the thing that makes emphysema different from sarcoidosis is that there is no fibrosis. And what do we mean by fibrosis? Scarring. So we know that Marie Fontana had scarring in her lungs. And we know that what she had wasn't emphysema. And you'll not see a single medical record from Dr. Green or Dr. Coopersmith that says that she had emphysema or chronic bronchitis.

And so we don't even have to get to the

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second issue, ladies and gentlemen. The first issue is what lung disease she has. Well, she doesn't have chronic obstructive pulmonary disease, because she doesn't have emphysema and she doesn't have chronic bronchitis. And you'll know that by looking at the medical records.

If you go to a doctor and he's a specialist, and he's a lung doctor, and he does these test and he treats you, and he treats you for five and six years, the plaintiffs would like you to think that they just, that that doctor just ignored it, that he didn't pay attention to it.

Or maybe that he thought she had chronic obstructive pulmonary disease or chronic bronchitis or emphysema and just didn't write it in the records. Now, isn't that a little foolish? The doctor wouldn't write it in the records?

The other difference between emphysema and sarcoidosis, I've already said that in emphysema there's no scarring, there's no fibrosis. But in emphysema, you can't breathe out. And in sarcoidosis, you can't breathe in.

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Emphysema is an obstructive disease, sarcoidosis is a restrictive disease. And we will show you a medical record, a series of medical records from December 1996 and January of 1997 that say, Ms. Fontana has pulmonary fibrosis, scarring of her lungs. And it will also say that Ms. Fontana, on her Pulmonary Function Tests, you won't have to read any numbers or have anybody interpret this, because on the report it says: Restricted disease, no evidence of obstruction.

January 7th, 1997, Pulmonary Function Test from Holy Cross Hospital. And that is a document that you'll be able to look at and take back with you into the jury room.

Let me touch briefly here on chronic sinusitis. You know, sinuses are these things up here under your skin that will get blocked when you get a head cold. Everybody gets head colds from time to time, everybody gets their sinuses blocked from time to time. You may even get a sinus infection and have to go to the doctor and get a prescription for an antibiotic to treat your sinus infection. But that is acute sinusitis. That's sinusitis that

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lasts for four weeks or less.

Chronic sinusitis is where you have this kind of infection, or post-nasal drip, or a cough, or inflamed nasal passages continuously for three months or longer. That's the definition of chronic sinusitis.

And what we're here about today is not acute sinusitis and not acute bronchitis. What the plaintiffs have to prove to you is that Ms. Fontana had chronic bronchitis or chronic sinusitis. And once again, nothing in her medical records suggests that she ever was diagnosed with chronic sinusitis.

Now, you know, the other piece of evidence, we've talked about Dr. Green's records and Dr. Coopersmith's records. We talked about the Pulmonary Function Test that says she didn't have an obstructive disease. But one of the things that we've not talked about yet is Ms. Fontana's own testimony.

I asked Ms. Fontana, because we had the right to take her deposition before this case was tried, these four questions:

Have you ever been diagnosed with chronic obstructive pulmonary disease? And her answer

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was no. And I expect you'll hear that from her again from this witness stand.

Have you ever been diagnosed with chronic bronchitis? And her answer was no.

Have you ever been diagnosed with emphysema? And her answer was no.

Have you ever been diagnosed with chronic sinusitis? And her answer was no.

Mr. Hunter argued to you about the Surgeon General and his report and said that ETS causes respiratory disease in healthy nonsmokers.

Now, the Surgeon General that you'll hear from, he'll testify in this case, was a Surgeon General in 1979 and '80. He was not the Surgeon General who was responsible for the production of the 1986 report that Mr. Hunter will introduce into evidence.

But let's look at what the Surgeon General said in the 1986 report about respiratory disease, because you will have this with you.

On Page 10, the Surgeon General writes: It seems unlikely that ETS exposure by itself is responsible for a substantial number of cases of clinically significant chronic obstructive lung disease. "Unlikely." The

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Surgeon General of the United States.

Page 13: The implications of chronic respiratory symptoms for respiratory help as an adult are unknown and deserve further study.

And finally, Page 14: Adults exposed to environmental tobacco smoke may have a small change on Pulmonary Function Testing, but are unlikely to experience clinically significant deficits in pulmonary function as a result of exposure to ETS alone.

Each one of you knows that being around ETS affects people differently. It may make your eyes water, it may make you sneeze, it may give you a stuffy nose, you may not like it. But does it cause chronic respiratory symptoms? The Surgeon General says: It's unknown and deserves further study.

Today, 15 years later, Dr. Ingram from Emory in Atlanta, will tell you that the state of the medical and scientific literature is such that it still has not been shown that ETS causes COPD, emphysema, bronchitis, chronic bronchitis or chronic sinusitis.

Ladies and gentlemen, when we come back to you at the end of this trial, we're going to

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ask you to find that the plaintiff hasn't met her burden of proof in this case to demonstrate that environmental tobacco smoke in fact was the specific cause of any lung condition that she had.

And I think when you hear all the evidence in the case, you'll agree with us that the plaintiff has not satisfied that burden of proof.

After the opening statements today, beginning tomorrow, the plaintiff will begin putting on their evidence, but Mr. Reilly is going to talk with you a moment about what some of the evidence specific to environmental tobacco smoke is going to be. But neither he nor I nor Mr. Upshaw or Mr. Geraghty will have another opportunity after today to talk with you and speak with you until the end of the trial, when we get our opportunity to make closing argument.

And all that we ask of you is that you keep an open mind. I said yesterday it's like a baseball game, and the plaintiffs are always getting to bat in the top of the inning.

Give us our chance to get up to bat to

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present our evidence before you make a determination with respect to what diseases Ms. Fontana had, and whether the plaintiff has shown that ETS was the specific cause of her lung disease.

Now, with the Court's permission I'll turn it over to Mr. Reilly.

Thank you very much, ladies and gentlemen.

MR. REILLY: There's something to be said for being last, right?

Good afternoon, ladies and gentlemen. It's a quiet bunch.

I know it's late. I apologize.

On behalf of Tony Upshaw, Bill Geraghty and myself, because we have about a half an hour, and that's all the longer I'm going to take, I appreciate your patience and your attention. As I said, I know it's late.

We've divided this up so that only I'm going to talk, even though all three of us would have something to say.

Ladies and gentlemen, before I get really started, let me say this to you, it's in the medical records. The evidence in this case is in the medical records. And we're going to

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help you through them. Like tomorrow, when plaintiffs' counsel brings Dr. Foley, we're going to walk you through the medical records.

I know it's long and I know that it's probably not the easiest language you've ever seen. But walk with us through the medical records, because that's where the evidence is in this case.

Doctors write notes and write notes and write notes. And at the moment that they're caring for the patient, what do they do? They write down what they think is wrong with the patient. They do it right then. They don't do it years later when there's a lawsuit going on, they do it right then.

We'll show you, for example, Mr. Hunter said "peribronchial thickening". Remember he said that? He said Dr. Foley is going to come to talk to you tomorrow, he's going to show you peribronchial thickening.

Ladies and gentlemen, watch Foley. See if there is -- I mean, this lady has had more X-rays taken, there's an expression, than who laid a clunk (Phonetic).

That just means there's a ton of them.

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Watch tomorrow. See if there is one, one radiology report. Radiologists look at these X-rays, pulmonologists look at these X-rays. See if there is one that says "peribronchial thickening". Their whole case hinges on peribronchial thickening. See as we go through tomorrow if there is one peribronchial thickening. And I'm going to -- fair warning, I'm going to take them through it. See if there's one reference. There will be an excuse, Dr. Foley will give you an explanation, oh, the doctors are looking for something else, something else more important, looking for sarcoidosis -- looking for something else. Watch tomorrow.

Okay, now, that isn't even what I was going to talk to you about.

Let me get set up here.

All right. What I came to talk to you about, not that it has a thing to do with sarcoidosis, remember everybody is in agreement, nobody knows what causes. Sarcoidosis, they've looked for 100 years to find an explanation, there have been dawn after dawn after dawn as to what's the cause. No one

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knows, there's even science around that says that smoking protects you against getting this disease. I don't recommend smoking to avoid sarcoidosis, but that's what some science shows.

Even though smoke, cigarette smoke, has nothing to do with sarcoidosis, the plaintiffs' lawyers have brought up in this case the issue of the exposure of Ms. Fontana to environmental tobacco smoke while she was a flight attendant working for TWA. So that's what I'm going to talk to you about: What was her exposure level to environmental tobacco smoke while she was a flight attendant?

Well, I'm going to present evidence to you -- and if I'm too loud, too close, tell me -- what I'm going to tell you about is evidence that's going to be presented in three different categories, okay.

The first is nobody has told you what is environmental tobacco smoke yet. So I'm going to tell you and we're going to present evidence about what is environmental tobacco smoke.

Then we're going to present evidence on how much Ms. Fontana was exposed to it when she

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was working on her flights.

And the third category is going to be: How long was she exposed to it? In other words, how many flights did she take in which she was exposed to environmental tobacco smoke?

After Mr. Hunter's opening statement, your impression undoubtedly is that she was doing nothing but international flying and that she was on flights five hours, ten hours, going to Europe all the time.

Well, let's see what the evidence is really going to be in this case.

Okay, what's environmental tobacco smoke? Is it mainstream smoke, the smoke -- these are kind of terms of art -- mainstream smoke, what is mainstream smoke?

When a smoker takes a cigarette and takes a puff on it, that's mainstream smoke. People, scientists have measured it, they've identified the chemical components of it. It's highly concentrated. Can you imagine that? Somebody is sucking in to get the air, the smoke, to draw through over the coal and draw through the tobacco and into their mouth.

All right, another term that you may well

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hear in this case is called sidestream smoke. What is sidestream smoke? Because sidestream smoke has also been measured and it's been tested.

Well, if Mr. Hunter is not a drawer, I'm definitely not a drawer. But that's a cigarette, okay, that's the burning end of it. And if I had a red marker, I'd put it in red. In laboratories, people have tested the smoke right at the burning end of the cigarette.

Now, nobody inhales sidestream smoke because nobody puts -- that doesn't smell good. Nobody puts a cigarette, the lit end of the cigarette, the coal right up to their noses. But they've tested it to see what's there. That's called sidestream smoke.

Okay. So what is secondhand smoke or environmental, what is environmental tobacco smoke or ETS?

Well, in a way it's kind of a combination of mainstream smoke and sidestream smoke, in a way. But then, in a big way, it's not at all. ETS is made up of when a smoker exhales and he or she put air in the atmosphere. That's part of environmental tobacco smoke. And the other

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part is when the smoke moves away from this burning tip and moves off into the atmosphere, that's environmental tobacco smoke, too. So those are the two components.

Now, does it have all the chemicals that are in mainstream smoke or in sidestream smoke? Absolutely not. Have people measured environmental tobacco smoke? Absolutely.

What's the big difference between environmental tobacco smoke and all these other kinds of smoke? Two major differences, one is that it's aged. What does that mean? Well, it means that as it moves away, it changes chemical composition. Some of the chemicals don't exist anymore, some of the chemicals fall away. That's aging. But the most important difference is that as it disperses, it becomes very, very diluted.

Mainstream smoke, very concentrated. Sidestream smoke, less concentrated, but more concentrated than environmental tobacco smoke, which is extremely diluted.

How diluted? Well, some of the things they look for and they've tested for that they would ordinarily expect to find in mainstream

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smoke or sidestream smoke they can't even find in environmental tobacco smoke.

Other things they can only find in such trace amounts, it takes incredible equipment, incredibly sensitive equipment to even measure it. How do they measure it? They measure it in units that are called micrograms and nanograms.

Now, when I was in school they taught pounds and ounces, but now we're all metric, right? We're all metric. So a kilogram is 2.2, a gram is 1/1000ths of that, and a microgram is one millionth of a gram. A nanogram is a billionth of a gram.

Now, does that make any sense to anybody? It didn't to me when I heard it. But this is the way it was explained to me.

If I had a cubic meter of air right here and I threw a microgram in it, could you see it with your eye? No way.

If I had a cubic meter of air right here and I threw a nanogram in it, could you see it with the naked -- oh, absolutely not.

All right, so let me give you an example that will make a little sense to you, you can

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visualize. If I make that microgram the size of -- you go to the coffee shop and you get one of those sugar packets, if I make that the size of a microgram, how big do I have to make that cubic meter of air so that when I throw that sugar packet in it it's the same ratio?

I have to make that cubic meter of air the size of the Orange Bowl. It's like throwing a packet of sugar into the Orange Bowl.

How about the nanogram? How big, if I throw that packet of sugar into the cubic meter of air, how big does the cubic meter of air have to be for a nanogram? You won't believe this. A thousand Orange Bowls. I think that's bigger than Dade County. That's how big it has to be.

All right, now you have a sense of what environmental tobacco smoke is and how diluted it is.

Second category. What was her level of exposure? Well, to help answer that question, what evidence is going to be presented in this case? And that's why I've prepared this time line. Everybody see that? Okay.

Let's run through it real quick. This is

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what we call the Fontana time line.

She begins flying as a flight attendant in 1972. She begins flying for TWA. At that point in time, TWA generally divided its flight attendant duties between international and domestic, what we call domestic, in other words, flying around the United States. You could join up either way, you could join up as an domestic or you could join up as an international. She joined up as an international.

Now, in 1973, in May of 1973, the CAB -- what's that stand for? The Civil Aeronautics Board. Some of you look too young to know what was CAB. But it ran the airlines. It was a governmental agency that controlled, that administered the commercial airlines.

The CAB in 1973 decided that they were going to separate smokers from nonsmokers. Did they do it because they were concerned about the health of the nonsmokers? Actually there was a study that had been commissioned by the Federal Aviation Administration and the Department of Health, Education and Welfare.

And the results of that came out and,

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based on the results of that study, the Civil Aeronautics Board realized the study results said: Environmental tobacco smoke is way too diluted to present a health risk on airplanes to passengers.

But it's annoying to a lot of folks. So let's separate smokers from nonsmokers. And that's exactly what the Civil Aeronautics Board did in May of 1973.

All right. Ms. Fontana continued as an international flight attendant almost always flying on international flights until 1986. Now, there's going to be testimony in this case that in about 1980 -- I don't have a line on here, but I could just write it on -- she was originally diagnosed with sarcoidosis when she had some gall bladder surgery.

And so here is her diagnosis with sarcoidosis. And she continues to fly. 1986, TWA flight attendants go out on strike.

I think the machines went out at the same time. They go out, and they're on strike until August of 1988. And during that interim period, Ms. Fontana didn't work as a flight attendant, she went to real estate school, she

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got her real estate -- I think she got her license, I'm not sure about that, but she went to work for a real estate agency.

Then we have the names of the school she went to, Gold Coast School of Real Estate and where she worked at Andy's Realty, and she worked there for three months. And then the strike was over, flight attendants were called back. But you know what, not all the flight attendants went back to work, as often happens.

Thirty percent of TWA's flight attendants didn't come back. They said they wanted to go do something else.

What happened in between while the strike was ongoing? Well, in April of 1988 Congress had enacted legislation that went into effect that banned, banned smoking on all domestic flights, in other words, all flights in the United States of two hours or less.

What does that mean? It means that if you're going to fly from here to Atlanta, couldn't smoke. Going to fly from here to Seattle, you could smoke.

When Ms. Fontana came back to work, that was what her situation was. She could be on

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flights, and she was -- I forgot to tell you, when she went back to work, no longer were you just flying international or just flying domestic, now they mixed them all up, you could bid on whatever you wanted to fly on.

Any flight less than two hours, domestic flight, no smoking. Not too long after she came back to work in February of 1990, Congress had enacted legislation again that banned smoking on all domestic flights. In other words, if you were flying anywhere in the United States, that included San Juan, Puerto Rico, if you flew to a Hawaii, no smoking. Ms. Fontana was flying on both domestic flights and international flights.

As you were told a while ago, we actually have -- TWA didn't actually have all the records going all the way back, but they had four years of records, '93, '94, '95 and '96.

So we're able to identify exactly what flights Ms. Fontana was on, where she flew to, what the destinations were.

And we know the exact number of international flights versus domestic flights. And we know that because of her seniority --

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matter of fact, she had enough seniority when she went back to work that she was a flight in-service manager, in-service manager. That's the highest position on the airplane.

How do we know that? We know that because she has doctors, she had a doctor -- she had a heart problem, not related to this litigation. But there was concern that she couldn't fulfill the duties of an in-service manager, because the pressure was too great. Too much stress. So her doctor wrote a letter to the airlines saying: Please, she can be a flight attendant, she can fulfill all the duties, we're not worried about her fulfilling all the duties, but don't make her an in-service manager, too stressful.

Doctors write letters for patients when they're concerned that their health condition can be impacted by her job. The doctor wrote a letter saying: I'm concerned about this aspect of your your job. Please, TWA, don't make her be an in-service flight manager.

At any time, here is the diagnosis, did any doctor ever write a letter to the airlines, ever call the airlines, ever write a note in

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the medical records of this lady, a note in a chart anywhere: Don't let this lady fly on flights that have smoke on them because we're concerned it could impact her sarcoidosis or it could cause her to develop another disease.

Again, look at the medical records. It's a drum beat. I'll probably bore you to death with it this afternoon and I apologize for it, but look at the medical records. None, no where will you find that.

All right. And if they had, if they had said that, could she have done it? Could she have just been on domestic flights? Absolutely.

You'll see for example that in 1995 out of 186 flights that she took, right here, toward the end of her career, out of 186 flights, only 37 were international flights. 149 were domestic flights. No smoking flights.

Where did she go on her trips? Well, TWA in the last four years of her career, the international flights included Athens Greece, Barcelona, Spain; Cairo, Egypt; Frankfurter, Germany; Madrid Spain; Munich, Germany; Nice, France; Paris, France; probably you know where

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these are, Rome, Santa Domingo, the Dominican Republic, Telaviv.

Domestic flights, Atlanta, Boston, Dallas, Denver, Houston, Las Vegas, Miami, New York, Orlando, Phoenix, Portland, Salt Lake City, San Francisco, Seattle, St. Louis and West Palm Beach.

I don't know if they compare to Paris, but not bad spots.

All right. Now you have a sense of what her level of exposure was based on when she was flying and where she flew.

Let's talk now about what the exposure level was when she was on those planes. Now, what evidence are we going to present on that? We're going to bring to you a fellow by the name of Michael Ogdon.

MR. REILLY: Dr. Ogdon is employed by the RJ Reynolds Company. He is a fellow -- he's a scientist and he has been responsible for the creation of the methods of measuring environmental tobacco smoke in various locations, various situations. That has been adopted by literally all the people that do that kind of work. He's a recognized super

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expert in that field.

The government follows his pattern, his methodology, his technique, other folks that do include the American Chemical Society, the Occupational Institute of Safety and Health.

Those are names that just don't fall off my tongue, but those are the kind of people that follow his methodology. He's the guy that's going to come here and talk to you about what is ETS. Then he's going to talk to you about the measurements of environmental tobacco smoke.

They actually put machines right on airplanes, right on commercial flights. They put those machines right next to passengers, right in the aisle. I mean, he'll tell you where they're positioned. They're not where people can trip over them or anything. He'll tell you exactly, no more guesswork, no more flight attendants coming in and saying: Oh, it was terrible. We have the actual measurements.

The government studied this, private industry has studied this, the airlines have studied this. No more guesswork. You'll be able to know exactly what the measurements of

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environmental tobacco smoke have been throughout the airplanes. And he's going to tell you about it.

He's going to tell you the results of the studies, and he's going to tell you that he has reviewed -- this isn't something in the abstract, he's going to tell you that he's reviewed the flight history of Ms. Fontana.

And Mr. Hunter talked about cigarette equivalents. Dr. Ogdon is going to give you the cigarette equivalents not for some imaginary flight attendant, but for Ms. Fontana. He's going to tell you that based on her work history that her cigarette equivalent -- what does that mean? It means her environmental tobacco smoke exposure as if she had smoked that number of cigarettes. What is hers? It's two to five cigarettes a year. A year. Now, Dr. Ogdon is going to address the methodologies that Dr. Hammond is going to testify about in her video. And he's going to explain what's wrong with the methodology. He's going to explain who uses, if anybody, that, methodology. If anybody.

What Mr. Hunter didn't tell you about in

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Dr. Hammond's testimony is she's going to acknowledge that a flight attendant's exposure could vary 100 fold from what she's telling you, 100 fold. That's not 100 percent, that's 100 times. She's going to admit that the exposure level of a flight attendant is one-fifth the exposure level of somebody who lives at home with a spouse that smokes.

And you know, I couldn't make this -- I wouldn't use this language, not appropriate language, but I wouldn't use this language. She's going to tell you that if you move 7 rows away from the smoking section on an airplane by her own measurements, you can't find -- they look for a couple of different markers, you know, they look for nicotine, they test and put an instrument there and look to see using nanograms and micrograms and picograms. I didn't even mention that because it's too tiny. But they check to see, can we find a nanogram, a microgram? Couldn't even find one.

How about nicotine, could they find that? She's going to tell you seven rows away from the smoking seats on these airplanes they measured the nicotine. The amount was I think

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her words are tiny, teeny, weeny, weeny. That's the level.

We're also going to bring Dr. Teaf, Dr. Christopher Teaf. Dr. Teaf is a professor of toxicology at Florida State University in Tallahassee. He is the director, the associate director of the center of Mayo Medical and Toxicological Research. He is going to come here and assess the health risk to Ms. Fontana for flying on airplanes. And he's going to explain to you something about the content of PELS.

I know nobody has ever heard of a PEL. What does that stand for? Permissible -- boy is that poor penmanship -- exposure limit.

He's going to tell you that in the Occupational Safety and Health Administration, OSHA, has been directed by Congress to insure that Americans workers work in safe workplaces. And one of the things they have to do is to identify chemicals in the atmosphere, in workplaces that present health risks to workers. And then they have to decide what is a safe level of those chemicals for workers to work in. And when they establish that safe

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level, it's called a permissible exposure limit, a PEL.

Now, have they ever established a PEL for environmental tobacco smoke? No. But they have established PELs for some of the chemicals that are found in trace amounts in environmental tobacco smoke.

For example, carbon monoxide. Dr. Teaf will come here and he will tell you that Ms. Fontana, based on the exposure levels on airplanes, would have to work for two years as a flight attendant to get the same level of exposure to carbon monoxide that an American worker working in an atmosphere with a permissible exposure limit eight hours a day for one week would have. She's got to work for two years when the regular worker works for a week. And that is the lowest PEL level that she's exposed to. Other chemicals, the PELs are like 10 years, 20 years, 100 years. He's also going to do a comparison what of what the exposure level of flight attendants is versus other occupations like people working in bars or people working in restaurants or people that live in homes with spouses that smoke. He's

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going to do all that for you.

Now you're going to get a sense of what the exposure level is like for Ms. Fontana on airplanes. And it's all based on studies, not guesswork, not what they call anecdotal, not based on flight attendants coming in and -- by the way, those flight attendants, pay close attention to who they are and who they're represented by.

THE COURT: About two, three minutes.

MR. REILLY: We're also going to bring Joyce Coleman who worked for TWA as a manager of in-flight services. She's going to tell you all about what it's like to be a flight attendant. And all about Ms. Fontana's rights as a flight attendant.

Let me tell you that as his honor explained to you when you were seated, you now are going to perform the task which serves as the backbone of our judicial system. Don't lose focus of what this case is really all about. It isn't about exposure levels, it's about what is the illness that Ms. Fontana suffers from today?

Look in the records with us as we go

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through the evidence in this case, why is she getting a lung transplant? We're going to show you the records. The word that is repeated over and over and over and over is sarcoidosis, sarcoidosis, sarcoidosis.

Unfortunately, Ms. Fontana is one of those folks who gets this disease, we don't know why people get it, in whom the disease progresses, nobody knows why it progresses, they have no cure. They have a treatment, does it work? Obviously not. Unfortunately, if you're one of those people and she's in that group, that are most susceptible, she's in the group in which it progresses most often, no one knows why. She has arrived at what they call end stage sarcoidosis. It's a sad, sad fact. Look in the lung transplant medical records, that's the word you will see, sarcoidosis. Will you find any reference to environmental tobacco smoke? Zero. Zero. So ladies and gentlemen, on behalf of Philip Morris, Lorillard, Brown & Williamson, RJ Reynolds, we thank you for serving as the backbone of our judicial system. I look forward at the end of this case when I get to address you again in my closing argument

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when I get to review with you whether or not this didn't turn out to be the evidence that I said it was going to be in this case.

Thank you.

THE COURT: Take that time line down, please.

MR. REILLY: Yes, Your Honor.

THE COURT: Ladies and gentlemen, that's the end of your labors for today. Do me a favor and leave your notepads on the seats. And remember my instructions earlier today. I'm not going to repeat them to you verbatim, I'm not even going to give it a good try. I know you'll remember them.

Remember one thing, that there has been some media attention to this case and not to look at it or read any reports about this trial. With that, just have a good evening. And if you come to the second floor tomorrow at about 9:45, I should be finished with my early morning calendar, and we should be able to start by about 10:00. Maybe a little after. So I don't want you to get there any earlier than 9:45.

Other than that, have a good evening and

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we'll see you tomorrow.

(The jurors exited the courtroom.)

THE COURT: Have a seat.

MR. WEINSTEIN: Your Honor, most respectfully, I mean, I really hate to say this, but tomorrow when I get the actual transcript I'm going to have to ask for sanctions against Mr. Reilly. In a very sophisticated way he went against just what you cautioned Mr. Engram on and that goes to choice. Very sophisticated. They sneak things in so quickly, you almost -- I recognized it right away, but it would have caused more problems, Judge, it would have caused more attention, so I just sat back and waited. But I got very angry at that moment.

You know, judge, you cautioned them and said to Mr. Engram, if you bring this up again, you're going to have to deal with me, you said this to Mr. Engram and Mr. Reilly was around. And I'm talking about the issue of choices. They don't say it, but they throw it right there. They throw it on the table for the jury in a sophisticated way to consider. Mr. Reilly clearly said when the strike was over, the

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plaintiff came back, but 30 percent didn't. Now, Judge, he could have said when she came back, she came back to work and then gone on with it. Why would he say 30 percent of the flight attendants didn't come back?

THE COURT: Let me cut you off. It's almost 5:30. I'll look at your motion tomorrow. And I also made some marks on my transcript here. So we'll deal with it tomorrow.

Anything other than this that?

MR. WEINSTEIN: I only brought it up because I didn't want Your Honor to think we missed that.

THE COURT: I wouldn't do that.

Anything else at this point in time?

MR. HUNTER: No, sir.

THE COURT: We'll be in recess.

(A recess was taken at 5:25 p.m.)

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